INDEX TO BRIEF IN SUPPORT OF CERTIORARI

	Page
Petition for Certiorari	1
Questions Presented	5
Reasons for Granting Writ	6
Brief in Support of Certiorari	19
Reference to Reported Opinions	22
Statement of Basis of Jurisdiction	22
Specification of Errors	22
Statement of Case	24
Argument	36
I. In cases where relation of parent-subsidiary companies is shown, the burden of defending fairness of intercompany transactions when challenged on behalf of subsidiary, rests upon parent. It is unlikely under the present record that International Paper Company as present parent company can sustain this burden	36
II. On measure of recovery the record is clear that Hydro's recoverable damages against Paper Company would aggregate $131,859,059.56 as against a proposed settlement of $10,000,000. Such settlement is accordingly inadequate	38
III. Paper Companies' defenses as disclosed in the record are not substantial	40
1. Contest of personal jurisdiction	40
2. Laches and limitation	42
3. Defense of ratification	43
4. Defense of exculpatory clause in Hydro's trust indenture	43

Page

5. Defense under the Hayes-Georgian case.. 44

6. Other defenses 46

IV. Upon failure of the District Court to make findings of fact and conclusions of law, the Court of Appeals should have reversed and remanded for findings, or in the alternative, made its own findings and conclusions independent of any special weight attaching to the ruling below as a discretionary ruling..... 49

Conclusion 52

Appendix containing reprint of Court of Appeals decision 53

TABLE OF CASES, TEXT BOOKS AND STATUTES

Table of Cases

American Legion Post v. First Natl. Bank, 113 Fed. (2d) 868 31

Atlantic Natl. Bank v. Harris, 118 Mass. 311, 318.... 42

Bach v. Friden Co., 148 F. (2d) (CCA 6) 407..... 52

Bowles v. Russell Packing Co., 140 F. (2d) (CCA 7) 354 51

Brewer v. Boston Theatre, 104 Mass. 378, 395..... 43

Browning v. Fidelity Trust Co., 250 Fed. ((CCA 3) 321, 325 44

Buckman v. Elm Hill Realty Co., 312 Mass. 10..... 37

Canadian Pac. R. Co. v. Sullivan, 126 F. (2d) (CCA 1) 433 41

In re Central States Elec. Corp., 143 F. (2d) (CCA 4) 684 15-16

Cohen v. Young, 127 F. (2d) (CCA 6) 721..... 12, 39

Connelly v. Bartlett, 286 Mass. 311, 318..... 42

Consolidated Co. v. Dubois, 312 U. S. 510, 522; 85 L. Ed. 982, 991..... 37

	Page
Corry v. Barre Granite Co., 91 Vt. 413	37
Edwards v. Holland Banking Co., 75 F. (2d) (CCA 8) 713	51
Endicott v. Marvel, 18 N. J. Eq. 378; aff. 83 N. J. Eq. 632	48
Fardy v. Buckley, 231 Mass. 377	33
Flint v. Codman, 247 Mass. 463, 472	44
Geddes v. Anaconda Co., 254 U. S. 590, 599	37
Gordon v. Hartford Sterling Co., 319 Pa. St. 172	11
Hayes v. The Georgian, 280 Mass. 10	44, 45
Hollander v. Breeze Corp., 26 A. (2d) (N. J. Ch. 507, 514; aff. 26 A. (2d) (N. J. Ct. Err. and App.) 522	45
Hotaling v. Leach, 247 N. Y. 84	33
Humphrey v. Helgerson, 78 Fed. (2d) (CCA 8) 484	51
Hunter v. Mutual Res. Life Ins. Co., 218 U. S. 573	41
Hyams v. Calumet & Hecla Co., 221 Fed. (CCA 6) 529, 537	37
Johnston v. Trade Ins. Co., 132 Mass. 432	41
Keenan v. Eshelman, 120 ALR (Del.) 227; 2 A. (2d) 904	37, 43
Kelley v. Everglades Dist., 319 U. S. 415	10, 11, 49
Knapp v. Imperial Oil Co., 130 F. (2d) (CCA 4) 1	51, 52
Lazenby v. Henderson, 241 Mass. 177	37
Lebold v. Inland S. S. Co., 82 F. (2d) (CCA 7) 351, 353, 354	44
Lebold v. Inland Steel Co., 125 F. (2d) 369, 373; cert. den. 86 L. Ed. 1749, 316 U. S. 675	37
Lee v. Fiske, 222 Mass. 424	44
Lemm v. No. Cal. Bank, 93 F. (2d) (ICCA 9) 709	52
London Guar. and Acc. Co. v. Woelfle, 83 F. (2d) (CCA 8) 325, 329	41
Louisville Gas & Elec. Co. v. Fed. Power Comm., 129 F. (2d) (CCA 6) 126	34

	Page
MacDonald v. Aetna Indemn. Co., 88 Conn. 571	11
Mairs v. Madden, 307 Mass. 378, 380	44
Marcuse v. Broad-Grace Corp., 101 ALR (Va.) 217; 180 S. E. 327	38
May v. Midwest Ref. Co., 121 F. (2d) (CCA 1) 431	36
Mayo v. Lakeland Co., 309 U. S. 310	10, 51
Medford Trust Co. v. McKnight, 292 Mass. 1	32
Miner v. Belle Isle Ice Co., 93 Mich. 97	38
Niagara Falls Power Co. v. Fed. Power Comm., 137 F. (2d) (CCA 2) 787; cert. den. 88 L. Ed. 477, 492	34
Re Niagara Falls Power Co., 44 P. U. R. (N. S.) 291	34
No. Confidence Co. v. Fitch, 208 P. 328	38
Old Dominion Copper Co. v. Bigelow, 203 Mass. 159	37, 42, 43, 45, 48
Oklahoma v. Atkinson, 85 L. Ed. (June 1941) 1487, 1499	34
In re Ortiz Estate, 27 A. (2d) (Del. Ch.) 368	11
Panama Mail SS. Co. v. Vargas, 281 U. S. 670	10, 51
Parker v. Nickerson, 137 Mass. 487	32
Penn Canal Co. v. Brown, 235 Fed. (CCA 3) 669, 684; cert. den. 242 U. S. 646	36
Penn Water etc. Co. v. Fed. Pow. Comm., 123 F. (2d) (App. D. C.) 155, 163	34
Pepper v. Litton, 308 U. S. 295, 306; 84 L. Ed. 281	36
Peterson v. Hopson, 306 Mass. 597, 610	43
Prudential Ins. Co. v. McCarter, 271 Mass. 132	32
Public Serv. Com. v. Wisconsin Co., 289 U. S. 67	10, 13
R. R. Comm. v. Maxcy, 281 U. S. 82	10, 51
Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673, 689	44
Ross v. Quinnesec Co., 227 Fed. (CCA 6) 337	37
Sacajawea Co. v. Skookum Lbr. Co., 116 Wash. 75	38
Sbicca-Del-Mac v. Milius, 145 F. (2d) (CCA 8) 389	52
Siano v. Helvering, 79 F. (2d) (CCA 3) 444	51

Singleton v. Harriman, 152 Misc. (N. Y.) 323; aff. 241 App. Div. 857 33
So. Pac. Co. v. Bogert, 250 U. S. 483, 492 44
Sparks v. Melwood Dairy, 74 F. (2d) (CCA 6) 695 .. 10, 50
Spiegel v. Beacon Participations, Inc., 297 Mass. 398 32, 37
Tempel v. United States, 248 U. S. 121 31
Timber Lands Assn. v. Neace, 92 W. Va. 196 37
Todd v. S. E. C., 137 F. (2d) (CCA 6) 475, 479 43
Trojan Corp. v. Green Mountain Power Co., 293 Mass. 377 41
United Hotels Co. v. Mealey, 147 F. (2d) (CCA 2) 816 36, 47
United States v. Appalachian Elec. Pow. Co., 85 L. Ed. 243 34
Von Arnim v. American Tube Works, 188 Mass. 515, 518 43
In re Webster Loose Leaf Co., 240 Fed. 779 38
Whitten v. Dabney, 171 Cal. 621 ..... 42, 48
Woodruff v. Heiser, 150 F. (2d) (CCA 10) 869 51

Statutes, Rules, Etc.

Ann. Laws Mass., Vol. 6, ch. 181, sec. 3, p. 61 40
Equity Rule 70½ 9
Public Utility Holding Company Act of 1935, 15 USCA secs. 79-79z 2, 3, 4, 6, 19, 20
Rule 1, Rules of Civil Procedure 8
Rule 52(a), Rules of Civil Procedure 8, 49
Rule 66, Rules of Civil Procedure 8
Rule 81, Rules of Civil Procedure 8
Section 240(a) Judicial Code amend. (Sec. 347(a), Title 28 U. S. Code) 2, 22
Sec. 11(a) and (b), (Pub. Util. Hold. Act) 6
Sec. 11(d) Pub. Util. Hold. Act 7
19 C. J. S., Corporations, secs. 749(c) and 805 38
15 U. S. C. A., sec. 79k(d) 7

In the

Supreme Court of the United States

OCTOBER TERM, 1946

No.....

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,
vs.
BARTHOLOMEW A. BRICKLEY, Trustee of
International Hydro Electric System,
SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Osmond Y. Ladd and Paul H. Todd pray that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the First Circuit entered in case file No. 4167 in said Circuit Court, on November 14, 1946 affirming the judgment of the United States District Court for the District of Massachusetts entered December 26, 1945.

OPINIONS BELOW

The District Court filed no opinion, findings of fact nor conclusions of law.

The opinion of the Circuit Court of Appeals was filed November 14, 1946, but is not yet reported. For the convenience of this Court, the Circuit Court's opinion is printed in an appendix hereto. Application for stay of mandate pending application in this Court for writ of certiorari was duly made and an order staying the mandate until December 30, 1946 was entered on November 25, 1946.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended, being Section 347(a) of Title 28 of the United States Code.

STATEMENT OF MATTER INVOLVED

The general matter involved is the preservation of assets preceding final liquidation of International Hydro Electric System. This System (hereinafter called Hydro) is one of the more notorious utility holding companies, which were the occasion for enactment of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. §§ 79-79z.

Hydro and its subsidiary New England Power Association, were the subject matter of Parts 31 and 32 of the Federal Trade Commission Study and Report underlying this legislation.

In more detailed particular, the specific matter involved in this petition is the approval by the two lower courts of a compromise settlement of all claims on behalf of

Hydro as a subsidiary company, against the present International Paper Company as the successor which had assumed all of the obligations of said subsidiary's former parent companies, International Paper & Power Company and former International Paper Company.

On July 21, 1942 the Federal Securities and Exchange Commission, (hereinafter called S. E. C.) ordered the dissolution of Hydro as a four tiered holding company contravening the standards of the Holding Company Act (R. 677-706).

On July 19, 1943 petitioner Osmond Y. Ladd commenced his derivative stockholder's suit in the Massachusetts Federal District Court on behalf of Hydro against International Paper Company for recovery upon Hydro's claims against its said former parent companies and shortly afterwards, Mrs. Janet M. Condon commenced her similar stockholder's suit in the Massachusetts State Court (R. 2, 200).

On August 12, 1943 the S. E. C. commenced its suit, likewise in the Massachusetts Federal District Court, to enforce the Hydro dissolution order. In addition to the usual statutory grounds for relief under the Holding Company Act, the Commission in its complaint, cited the pendency of said stockholders suits, and asked the District Court to investigate the merits of their underlying claims and take such steps as might be warranted (R. 192, *et seq.)*.

The District Court in due course appointed Mr. Bartholomew A. Brickley as Special Counsel to make this investigation (R. 261). Mr. Brickley devoted a year to the task and filed his exhaustive report recommending the continued prosecution of the litigation against Paper Company (R. 263). The District Court then appointed Mr. Brickley statutory trustee of Hydro under the Holding Company Act and directed suit accordingly (R. 306).

Mr. Brickley then commenced his Trustee's suit for Hydro, Civil Action 3280, in the said Federal District Court and a similar suit in Massachusetts State Court, claiming *inter alia*, damage recoveries exceeding $96,000,000 against the Paper Company (R. 485-513).

Later the District Court, on Mr. Brickley's petition approved a compromise settlement of all these cases and certain other Canadian claims against the Paper Company, in consideration of payment of $10,000,000 by latter to Hydro, together with the loan by Paper Company to Hydro's subsidiary Hudson River Power Corporation of the additional sum of $3,000,000 (R. 348).

At the settlement hearing, present petitioners submitted documentary evidence which together with other evidence secured by Mr. Brickley showed factual basis for Paper Company's liability and indicated a measure of recovery in Hydro's favor aggregating $131,859,059.56. The settlement constituted only 7½ per cent of such indicated recovery and was accepted by the Court under decree reciting merely:

> "that the compromise * * * is for the best interests of the estate * * * and the consideration * * * is fair, reasonable and adequate" (R. 348).

No findings or factual or legal analysis whatever, of a subsidiary nature were filed by the District Court on which its ultimate conclusion of fairness could be rationally predicated.

Petitioners Ladd and Todd (another stockholder and director of Hydro) appealed this settlement order to the United States Circuit Court of Appeals for the First Circuit, and upon affirmance there, now seek certiorari in this Court.

QUESTIONS PRESENTED

1. Whether the Court of Appeals is not in error in its decision that no findings of fact and conclusions of law were required of the District Court in support of its decision in this matter.

2. Whether the Court of Appeals decision is not erroneous in holding that the District Court had sufficiently complied with applicable requirements for finding of facts and conclusions of law in support of its decision approving this settlement.

3. Whether the District Court's order and decree approving this settlement should not have been reversed by the Court of Appeals and the case remanded for findings of fact and conclusions of law.

4. Or whether, in the alternative of reversal under Question 3, *supra*, the Court of Appeals, wholly independent of any reliance on special weight attaching to discretionary lower court rulings, should not have examined the record for itself and made its own specific findings of fact and conclusions of law, for the purpose of ascertaining in a general way the probable result of the full litigation of claims against the Paper Company.

5. Whether the Court of Appeals was not in error in failing to analyze correctly and adequately, the merits of Hydro's causes of action against the Paper Company together with the insufficiency of the several defenses thereto, all in the light of the relevant facts as shown by the record.

6. Whether the Court of Appeals was not in error in affirming the lower court on the assigned ground that no abuse of discretion had been shown on the part of the latter court in accepting the settlement.

7. Whether this settlement was not unfair and inadequate and should not have been rejected in view of the record showing below of substantial liability on the part of the Paper Company in Hydro's favor with potential measure of recovery thereunder, in the amount of $131,859,059.56.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals in this case has decided not less than three questions of general importance warranting the writ of certiorari herein, viz:

1. An important question of Federal law which has not been but should be settled by this Court.

2. Another important federal question in a way which is probably in conflict with the decisions of this Supreme Court.

3. Another important question in conflict with the decision of another Circuit Court of Appeals upon similar considerations.

Interconnected with these general questions is the further particular question, whether Hydro stockholders are not entitled to secure the rejection of an inadequate settlement of their derivative Hydro causes of action against the Paper Company. This question involves important principles of local law which petitioners believe have been decided in a way probably in conflict with such local law.

1. The important question of federal law which has not been, but should be settled by this Court concerns the Public Utility Holding Company Act of 1935, intended among other purposes to protect investors in the securities of such holding companies.

Under Section 11(a) and (b) of the Act, the S. E. C. is granted original authority to examine into and ascertain whether the structures of such companies satisfy the statutory standards, and if not, then to specify in particular cases, the type of action, simplification, reorganization or liquidation which shall be sufficient to meet the standards.

In order to carry out its orders, the S. E. C. is authorized under Section 11(d) of the Act, to:

> "apply to a (proper district) court (of the United States) * * * to enforce compliance with any order issued under subsection (b). In any such proceedings, the Court, as a *court of equity* may, to such extent as it deems necessary * * * take exclusive jurisdiction and possession of the company * * * and the Court shall have jurisdiction, in any such proceeding to appoint a trustee * * * to hold or administer under the direction of the Court, the assets so possessed * * * . In any such proceeding * * * the trustee with the approval of the Court shall have power to dispose of any and all of such assets and subject to such terms and conditions as the Court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which has been approved by the Commission."
>
> 15 U. S. C. A. § 79k(d).

A large extension of equitable jurisdiction is thus conferred upon federal district courts, involving the reconstruction of the affairs of some of the largest corporations in the country.

In the present case, the Court of Appeals has declared that the usual duties incumbent upon lower federal courts, to support their decisions with findings of fact and conclusions of law, are inapplicable to proceedings under the Holding Company Act.

But Rule 52(a) of the Rules of Civil Procedure provides:

> (a) In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment.
>
> Rule 52(a) 28 U. S. C. A §§ 721-723 (West Publn. Edn.), p. 677.

However, the Court of Appeals held that the present matter and presumably any other decision of the District Court in Holding Company enforcement cases, do not constitute trials of issues on facts. Instead they are said to be administration proceedings under the Utility Holding Company Act, wherein as in the present case, Mr. Brickley is in a position similar to that of a receiver. That the provision of the Federal Rules applicable to such situations is not Rule 52(a), but rather Rule 66 concerning receivers.

Rule 66 last mentioned, provides that:

> "The practice in the administration of estates by receivers and by other similar officers appointed by the Court shall be in accordance with the practice heretofore followed in the Courts of the United States, or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."
>
> Rule 66, 28 U. S. C. A. §§ 721-723 (West Publn. Edn.) P. 740.

Elsewhere in the Civil Rules, it is stated:

> "These rules govern the procedure in the district courts of the United States *in all suits of a civil nature* whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81."
>
> Rule 1, 28 U. S. C. A. §§ 721-723 (West Publn. Edn.) P. 371.

Rule 81 does not except the present type of suit nor actions generally under the Holding Company Act.

> Rule 81, 28 U. S. C. A. §§ 721-723 (West Publn. Edn.) p. 769.

And in the practice followed in courts of the United States prior to adoption of the Civil Rules, findings of fact and conclusions of law were always required in equity suits, without exception even for receiverships. Thus it is provided in former Equity Rule 70½ viz:

> "In deciding suits in equity * * * the Court of first instance shall find the facts specially and state separately its conclusions of law thereon."
>
> 28 U. S. C. § 721-723 (West Publn. Edn.) p. 816.

Prior to Rule 70½, and generally with respect to interlocutory orders as well, findings of fact and conclusions of law were always required in all equity proceedings.

> *Railroad Comm'n. v. Maxcy*, 281 U. S. 82;
> *Public Service Comm'n. v. Wisconsin Co.*, 289 U. S. 67.

If the decision below remains undisturbed, then litigants in S. E. C. enforcement cases under the Holding Company Act, will be deprived of the fair and intelligent review of lower court judgments, which findings of fact and conclusions of law were designed to assure.

This Court has repeatedly emphasized the necessity for specific findings and conclusions by courts of first instance, in all appealable equity rulings. The purpose of such findings, etc., was to make certain that appellate courts be informed as to the nature of issues decided and especially upon the point whether the lower court had acted upon its own view of determinative questions of law reviewable on appeal, or upon a permissible discretion in relation to matters of fact or expediency.

Public Service Comm. v. Wisconsin Co., 289 U. S. 67;
Railroad Comm. v. Maxcy, 281 U. S. 82;
Mayo v. Lakeland Co., 309 U. S. 310;
Panama Mail S. S. Co. v. Vargas, 281 U. S. 670;
Kelley v. Everglades District, 319 U. S. 415.

and see—

Sparks v. Melwood Dairy, 74 Fed. 2nd (C. C. A. 6) 695.

2. The second important federal question above noted, which has been decided in a way probably in conflict with applicable decisions of this court, relates to the sufficiency of the findings by the district court, assuming findings of fact and conclusions of law to be necessary.

The District Court's only findings in this case were those contained in its final decree stating:

> "That the Court hereby determines that the compromise provided for * * * is for the best interests of the estate of said System (Hydro) * * * that the consideration * * * is fair, reasonable and adequate" (R. 348).

The Court of Appeals held this finding, in the nature of ultimate facts, to be sufficient, and entirely overlooked the contrary decisions of this Court upon the precise point.

In a municipal bankruptcy proceeding reaching this Court, the lower court had confirmed a composition plan upon conclusions contained in the decree, that the plan was:

> "fair, equitable and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors."

On review the Supreme Court held that this statement was not a sufficient compliance with the requirement for findings of fact and conclusions of law. To the contrary the lower court should have made a reasoned estimate of probable future revenues available for the satisfaction of creditors and a determination of the extent to which each class was entitled to share in particular sources. This Court said:

> "To support such determinations there must be findings in such detail, and exactness, *as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can be rationally predicated.*"
>
> *Kelley v. Everglades District,* 319 U. S. 415 at 420.

The subsidiary facts and issues, on basis of which the instant controversy should have been weighed, include probable validity of Hydro's claims against the Paper Company; the apparent difficulties likely to attend enforcement of the same in court; the prospects of collectibility of judgment, if obtained; the relative importance of delay; the comparison of amounts of settlement with the prospects of full recovery; and lastly the wishes of parties in interest.

> *MacDonald v. Aetna Indemnity Co.,* 88 Conn. 571;
> *In re Ortiz Estate,* 27 A. 2nd, (Del. Ch.) 368;
> *Gordon v. Hartford Sterling Co.,* 319 Pa. St. 174.

Upon the above mentioned six considerations and each of them, the district court should have made a reasoned analysis and findings upon the relevant facts as disclosed in the record, not to the end, of reaching a decision which actually binds the Paper Company, but rather to the end of estimating soundly, the probable results of the litigation

if carried to conclusion. See the cases last enumerated in the preceding paragraph hereof.

The Court is required to make its own decision and analysis of the settlement's acceptability. He may not merely accept the opinion of "eminent counsel" as indicated by the Court of Appeals.

Cohen v. Young, 127 Fed. 2nd (C. C. A. 6) 721.

Incidentally, one of the firms of eminent counsel as mentioned by the Appellate Court, Rope, Gray, Best, Coolidge and Rugg, was counsel for the Paper Company at the very same time when the firm undertook to advise Hydro not to bring suit against the Paper Company. This firm had been attorneys for the Paper Company since prior to 1928 and had acted throughout the intervening period as Massachusetts counsel for the Paper Company (R. 272, 273; also see Exhibit F of the unprinted portion of record, pages 9-11).

The other eminent counsel Mr. R. G. Dodge who advised against suit was not furnished the full facts. After Mr. Brickley had examined these opinions in full, he concluded contrary to their advice (R. 263, 294).

The fact that such decision and estimate by the Court will not result in a final determination as against Paper Company on the merits, does not obviate the necessity for any findings whatever. Instead, as in decisions upon interlocutory injunctions, the duty of the Court is to make such findings and conclusions as the nature of the case permits.

> "While an application for an interlocutory injunction does not involve a final determination of the merits it does involve the exercise of sound judicial discretion. That discretion can be exercised only upon the determination in the light of the issues

> and facts presented, whether the complainant has made or failed to make such showing * * * as to warrant interlocutory relief * * *. The result of the Court's inquiry into the issues and into the facts presented * * * in order to satisfy itself * * * should be set forth by the Court in a statement of facts and law constituting the grounds of its decision. *While that decision is not on the merits and does not require findings of fact and conclusions of law which would be appropriate on final hearing, the Court should make the findings of fact and conclusions of law that are appropriate to the interlocutory proceeding.*"
>
> *Public Service Comm. v. Wisconsin Co.*, 289 U. S. 67 at 70, 71.

In the face of these cases, and especially the decision in the *Kelley v. Everglades* case, *supra*, the instant Court of Appeals held that the district courts recital of fairness of compromise was sufficient. The Appellate Court said:

> "These are findings of fact. They are ultimate facts, truly, and represent a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate. We do not see what more could be asked for. Certainly the Court was not required to put its guess as to the probable success of each claim and defense into a formally stated conclusion" (R. 1735).

3. The third important question above noted, the one which was decided in probable conflict with the decision of another Circuit Court of Appeals, concerns the relative right of junior security holders of Hydro to their insistence upon further prosecuting the Paper Company litigation, when the acceptance of the settlement will probably suffice to pay off the preferred claims of the senior securities in Hydro's system.

Present Petitioners are the owners of quantities of Class A stock, the junior security of Hydro now outstanding.

The capital contribution to Hydro which was secured from the original sales of the Class A stock exceeded $32,485,000, mostly at cost prices of $43 a share and upwards (R. 274, 276 and Ex. 1, Fed. Trade Commn. Report 1030).

The record does not contain a break down of values of Hydro's underlying assets, showing liquidation values applicable to Class A stock on the basis the $10,000,000 settlement recovery. But market values for the Class A stock on trading exchanges, at $11 to $12 a share, indicate a large loss on the original investment in this security in the event this settlement is finally accepted (R. 383). How much liquidating value, if any, will finally appear for the Class A stock is problematical. For instance at the time of hearing in the Court below considerable question existed as to whether Hydro could successfully refinance its debt on the 1932 Water Powers, and upon what terms (R. 1243-1245).

The outstanding securities of Hydro, Present Company, now comprise the following:

6% debentures principal	$26,568,000
$3.50 preferred stock, aggregate par value and accumulated dividends to 12/31/45..	12,866,785
Class A stock on basis original investment, in excess of	32,485,000

(R. 274, 276, 729, 730)

The debentures have first priority for payment in full, and the preferred stock has second priority for payment in full, all before distributions in liquidation can be made on the Class A shares.

The Circuit Court of Appeals indicated that the interests of the Class A stock were at most of subordinate concern in the evaluation of the settlement from the point of view of protection of the senior security holders. The Court said:

> "We do not know how well off the debenture holders will be if $10,000,000 is added to Hydro's assets. It is clear, of course, that they will benefit before the A stockholders do. It is equally clear that to the extent that the A stockholders can embark the corporate enterprise on long and expensive litigation, they will have a run for other people's money, the result of which, if rosy hopes are realized, will be a profit to them. But the risk will be on the holders of the senior securities. This element * * * is not conclusive, but is one of the items which may be properly considered" (R. 1726, 7).

In thus restricting the Class A rights to have their legitimate claims fully explored and litigated, for fear of injuring senior securities, the Appeals Court took a position exactly opposite to that of the Fourth Circuit Court of Appeals in the Central States Electric case.

In this latter case, the district court in reorganization proceedings had refused to allow investigation of claims of the corporation against Harrison Williams, former controlling stockholder, for misappropriation of the corporation's assets. The court believed that the conservation of assets for benefit of senior security holders precluded the expense of such investigation, but the Fourth Circuit held otherwise, stating:

> "We think it clear that in refusing to order the further investigation which the record here so clearly called for, the District Judge was not exercising the discretion vested in him *but was proceeding on the erroneous assumption* that he had no dis-

> cretion to order a further investigation in view of what he conceived to be the right of the debenture holders with respect to the funds in the hands of the trustees. * * * We think that * * * the facts so clearly call for further investigation and action that the order appealed from should be reversed."
>
> *In re Central States Electric Corp.*, 143 Fed. 2nd (C. C. A. 4) 684.

In our present case we have had the equivalent investigation by Mr. Brickley and the S.E.C. which the Fourth Circuit ordered in the Central States case. The report of our investigation indicated a good cause of action (R. 263-294) on Hydro's behalf against the Paper Company.

The same reasoning which gave the junior security holders in Central States the right to their investigation, gives Hydro Class A stockholders the right to have litigated their good cause of action on Hydro's behalf—without abatement for an unsatisfactory settlement which only protects senior security holders.

In conclusion it may be added that the Court of Appeals in the instant case did not attempt thoroughly to analyze either the probable merits of Hydro's claims against the Paper Company nor the defenses thereto. Several of the defenses were mentioned with comment that interesting and difficult questions were involved. Actually upon the record, the facts when carefully analyzed did not sustain the defenses. For instance the defense of Paper Company's immunity to suit in the State of Massachusetts, had already been twice decided adversely to Paper Company in these very proceedings, once by Judge Healey in the Ladd case (R. 48-59) and again by Judge Beaudreau of the Massachusetts Superior Court in Mr. Brickley's case in that forum (R. 358).

Judge Beaudreau granted Paper Company's motion to report his decision to the Massachusetts Supreme Court (R. 358). But the law of the point was not doubtful as this Court can verify by examining Judge Healey's opinion at R. 49.

Instead of reaching its own conclusions on the controlling factors of the settlement matter, the Court of Appeals reviewed the case for abuse of discretion *only*.

The reviewing court assigned to the district court's decision, the special weight attaching to discretionary rulings. But the fact is that no specific findings and conclusions by the lower court were contained in the record whereby it could be *known* whether any discretionary rulings were involved in the lower court's decision.

It is therefore respectfully submitted that the requested writ should issue to the United States Circuit Court of Appeals for the First Circuit directing that court to certify and send to this Court a full and complete transcript of the record in said case therein entitled Osmond Y. Ladd and Paul H. Todd, Appellants v. Bartholomew A. Brickley, Trustee of International Hydro Electric System, Securities & Exchange Commission, et al., Appellees, Consolidated Cause No. 4167, to the end that the same be reviewed and determined by this Court, and that your petitioners may have such other relief as this Court deems appropriate.

HOWELL VAN AUKEN,
Attorney for Osmond Y. Ladd and Paul H. Todd, Petitioners,
1603 Ford Building,
Detroit 26, Michigan.

In the

Supreme Court of the United States

OCTOBER TERM, 1946

No.....

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,
vs.
BARTHOLOMEW A. BRICKLEY, Trustee of
International Hydro Electric System,
SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents

BRIEF ON BEHALF OF OSMOND Y. LADD AND PAUL H. TODD IN SUPPORT OF APPLICATION FOR CERTIORARI

As stated in the attached petition for certiorari, International Hydro Electric System, organized in the 1920 decade, was one of the public utility holding companies whose structures and financial practices prompted the enactment of the Public Utility Holding Company Act of 1935.

Hydro, as this company will be hereinafter designated, was created by International Paper & Power Company as the promoter and parent company owning voting control of Hydro (R. 65, 67).

The greater part of Hydro's original cash capital, more than $48,000,000 (R. 51, 53) was derived from sale to the public of $30,000,000 of debentures and 475,000 shares of Class A stock.

International Paper & Power Company and its immediate subsidiary, former International Paper Company, acquired, at Hydro's inception, all of latter's Class B and comomn stock not publicly offered, and thus secured voting control of Hydro which they retained until at least as late as January 31, 1939 (R. 67, 275, 1029). On this date Paper Companies turned over all of said Class B and common stock to a group of three trustees, and the latter on June 16, 1941, pursuant to Securities and Exchange Commission order of January 17, 1941 (8 S. E. C. 485) surrendered said stock for concellation (R. 1030, 212). Hydro's Class A stock was then left as the outstanding junior security issue.

On July 21, 1942, the Securities and Exchange Commission, hereinafter called S. E. C., ordered Hydro's dissolution as a holding company contravening the standards of the Holding Company Act (R. 209, 238).

Following the dissolution order Osmond Y. Ladd as a stockholder of Hydro, commenced his derivative stockholder's suit in the Massachusetts Federal District Court, on behalf of Hydro, against present International Paper Company, to recover upon Hydro's claims against its said former parent companies, International Paper & Power Company and former International Paper Company (R. 2). Present Paper Company had assumed the obligations

of the two latter (R. 61). And shortly afterwards another Hydro stockholder, Mrs. Janet M. Condon, commenced her similar stockholder's suit in the Massachusetts State Court (R. 200).

Thereafter on August 12, 1943, the S. E. C. commenced its suit in the Massachusetts Federal District Court, to enforce the Hydro dissolution order. In addition to the usual statutory grounds for relief under the Holding Company Act, the Commission in its complaint stated the pendency of said stockholders suits, and asked the District Court to investigate the merits of their underlying claims and take such steps as might be warranted (R. 192, 200).

The District Court then appointed Mr. Bartholomew A. Brickley, special counsel to make this investigation (R. 261). After the filing of his thorough report recommending continuance of the litigation against the Paper Company (R. 263), the District Court next appointed Mr. Brickley statutory trustee of Hydro, and directed suit accordingly (R. 306).

Mr. Brickley then commenced his Trustee's suit for Hydro against Paper Company, Civil Action 3280 in said Federal District Court, and a similar suit in the Massachusetts State Court, claiming *inter alia*, damages exceeding $96,000,000 in behalf of Hydro (R. 485, 516). Later all these suits, Ladd, Condon and Brickley were compromised and settled pursuant to the District Court's approval of Mr. Brickley's petition in that behalf, for the consideration of $10,000,000 to be paid by Paper Company to Hydro, together with the loan by Paper Company to Hydro's subsidiary, Hudson River Power Corporation, of an additional $3,000,000 (R. 348).

Present petitioners deeming the settlement wholly inadequate, appealed therefrom to the United States Circuit Court of Appeals for the First Circuit where the settlement order was affirmed. Hence this petition for certiorari.

REFERENCE TO THE REPORTED OPINIONS

The District Court filed no opinion, findings of fact or conclusions of law, but entered only, the final judgment or decree printed in the record at page 348, and not reported.

The opinion of the Court of Appeals has not yet been finally reported, but copy is attached in the appendix hereof.

BASIS OF JURISDICTION

Jurisdiction is invoked under section 240(a) of the Judicial Code as amended, being section 347(a) of Title 28 of the United States Code.

SPECIFICATION OF ERRORS

(1) The Court of Appeals erred in its decision that no findings of fact and conclusions of law were required by the District Court in support of latter's decision in this matter.

(2) The Court of Appeals erred in its holding that the District Court had sufficiently complied with applicable requirements for findings of fact and conclusions of law in support of its decision approving this settlement.

(3) The District Court erred in its failure to reverse the District Court's order approving settlement and then

remand the case for findings of fact and conclusions of law.

(4) In the alternative of reversal under Specification (3) *supra,* the Court of Appeals erred in its failure, wholly independent of reliance upon special weight attaching to presumed discretionary rulings below, to examine the record for itself and make its own specific findings of fact and conclusions of law for the purpose of ascertaining in a general way, the probable result of the full litigation of claims against the Paper Company.

(5) The Court of Appeals erred in failing to analyze correctly and adequately the probable merits of Hydro's causes of action against the Paper Company, together with the probable insufficiency of the several defenses thereto all in light of the relevant facts as shown by the record.

(6) The Court of Appeals erred in affirming the lower court on the assigned ground that no abuse of discretion had been shown on the part of the latter court in accepting the settlement.

(7) The Court of Appeals erred in its failure to find and determine that the settlement in question was unfair, inadequate and unreasonable in view of the record showing of substantial liability on the part of Paper Company in Hydro's favor with a potential measure of recovery therein in the amount of $131,859,059.56.

STATEMENT OF THE CASE

The claims sought to be asserted in Hydro's favor against the Paper Company comprise rescission, or in the alternative, recovery of damages with respect to Hydro's purchase of two principal investments from the Paper Companies, viz.:

(1) An aggregate of 821,779 shares of New England Power Association (NEPA) common stock at a cost of $62,998,122.69;

(2) A group of water power properties purchased by Hydro in 1932 at a cost of $31,797,610.39, these water powers being taken in the form of securities—stock and debt of companies then made subsidiary to Hydro.

This second group of securities will be frequently designated herein as "1932 water powers."

At the inception of Hydro, Paper Companies immediately designated the personnel of Hydro's board of directors, comprising Archibald R. Graustein, president of Paper Companies, and Samuel C. Moore and Carl S. Hermann, two of the officers of NEPA (R. 549, 66, and Federal Trade Commission Report 448). The Trade Commission Report, hereinafter designated FTCR, was received in evidence as Exhibit 1 and together with several other Exhibits, was not printed in the Record. However under Court order at R. 1707-1709 same may nevertheless be referred to in argument, these unprinted exhibits having been returned to this Court along with the printed record.

With this Hydro board of directors installed, Paper Companies then "*caused*" Hydro to purchase the two

greater blocks of NEPA stock included in said first mentioned aggregate, namely, blocks of 378,030 shares and 398,763 shares respectively, all in accordance with the previous written agreement made by International Paper & Power Company (hereinafter called IPP) with latter's stock underwriters (pp. 2 and 3, Ex. B contained in unprinted Ex. 3A).

The remaining shares of said NEPA stock aggregate were purchased in the several succeeding months from Paper Companies or their nominees, all at an average cost for the entire aggregate, of $76.66 per share (R. 553, 554, FTCR 1035).

The NEPA purchase was largely financed through utilization of the $48,000,000 cash capital funds raised as above stated, from the general public. This cost was far in excess of reasonable values of the stock as abundantly shown in the record below. See Brickley finding, R. 272.

Thus on the books of NEPA said shares carried a value of only $55 as of December 31, 1928, and $57.69 as of December 31, 1929 (FTCR pp. 683 and 697).

NEPA book value in turn was excessive, because it reflected extensive writeups of underlying properties above original costs. Selection of just a few of these writeups as disclosed in the FTCR, and deduction of same from the NEPA balance sheets shows book value of NEPA common at $25 per share on December 1, 1928, and $29.62 per share in 1929 (FTCR, 617, 636, 494, 261-267, 932, 85, 89, 268, 275, 847, 320).

Earnings for NEPA for the four years of its existence prior to and including the year of Hydro's acquisition, viz., 1926 to 1929, were only $2.22, $2.15, $2.77 and $2.33 per share each year respectively (FTCR 715, 683).

Four year average earnings were only $2.37. At 15 times earnings, according to Mr. John J. Raskob's famous formula then current, the valuation of NEPA stock would only be $35.55 per share.

NEPA dividends in this period and subsequent, were only 37½¢ per share in 1926, $1.62½ in 1927 and $2.00 a year thereafter until the year 1934 when 75¢ per share only was paid, and dividends then stopped and never afterwards resumed. (FTCR 695; R. 965, 1023 and 222).

NEPA's earnings on corporate basis applicable to common stock for the 15 years period 1926 to 1940 averaged only $1.70 per share (R. 1064). NEPA's consolidated earnings over the ten year period, 1934 to 1943, as applicable to common stock averaged only $1.10 per share (Unprinted Ex. K., p. 23).

Actually Hydro has received no return from this $62,998,122.69 investment since 1934, and while small irregular earnings were shown on the stock, same could not be distributed. Even the preferred dividends were falling into arrears (Unprinted Ex. J, p. 22).

The S. E. C. in its order for dissolution of Hydro noted this absence of income from an investment representing 73.5% of the carrying value of Hydro portfolio, and stated:

> "When a holding company in the position of IHES (Hydro) having high fixed charges and preferred dividend requirements, fails to obtain a return for such a long period of time from an item constituting a preponderant part of its total investment portfolio, it is inevitable that serious financial difficulties result" (R. 222).

With respect to funds for the purchase of the 1932 water powers, Hydro sold an additional block of 265,000 shares

of its Class A stock to the public, in September, 1929, realizing additional capital in the amount of $12,985,000 therefrom (R. 276).

Shortly afterwards Paper Companies, pressed for money and without Hydro directors' approval, borrowed substantially all of Hydro's available cash and finally accumulated an obligation in Hydro's favor in the amount of $15,200,000 as of December 31, 1931 (R. 278).

For the purpose of repaying this obligation Paper Companies sold the 1932 water powers to Hydro by a vote of Hydro's board of directors comprising for the most part, individuals who were simultaneously officers, stockholders or directors of the Paper Companies or of their other subsidiaries.

Without detailing all the circumstances leading up to the transaction, Hydro's board of directors on June 23, 1931 voted to purchase these water powers for a price of $37,706,700 (R. 287).

This vote was taken on the recommendation of a two man special directors' committee including Samuel C. Moore, director of Hydro, who was also a secretary of IPP. Of the directors present and voting to purchase, at least eight of ten were subject to disqualifications preventing their vote on matters affecting the Paper Companies, viz:

Mr. Moore was Secretary of IPP (R. 284);

Mr. Weeks was an officer of Harris, Forbes & Co. and Chase, Harris, Forbes Corporation, both large stockholders of IPP through Public Utility Holding Corporation; also their affiliate Chase National Bank was a large stockholder of IPP (FTCR 968-970 and unprinted Ex. F pp. 16, 12), and was also a creditor

of Paper Companies then actively competing with Hydro for payment of its claims (Ex. F., pp. 9, 12, 16-18; R. 1707, 1709);

Mr. Lowell was a partner in Lee, Higginson Co., large stockholder of IPP (Ex. F, p. 15);

Messrs. Peters and Weed were director and vice-president respectively, of First National Bank of Boston, a large creditor of the Paper Companies also actively competing in this very matter with Hydro for payment of its claims (Ex. F, pp. 15, 16; also R. 291);

Mr. Coolidge was the New England Attorney for Paper Companies and former Secretary of IPP (R. 272, 273);

Messrs. Drury and Gale were directors of Paper Companies' Canadian subsidiaries CIP and Hull Electric Railways (R. 285).

Thereafter one of the directors, Mr. Childs, objected to the purchase and Paper Company subsequently reduced its price somewhat. On March 7, 1932 the directors voted again to purchase, this time for $31,797,610.39 (R. 288-290). On this occasion at least five out of seven of the directors voting on the proposal were disqualified, namely, Messrs. Coolidge, Lowell, Peters, Weed and Weeks, whose adverse affiliations have just been noted.

When purchasing these powers, Hydro's officers failed to secure requisite approval of the transaction from the New York Public Service Commission. The purchase price was paid in part by the allowances of credits against Paper Companies' debt to Hydro and the balance of price by Hydro's assumption of $16,995,000 of underlying debt against the properties. On one occasion when proceedings were later taken before the New York Commission for per-

mission to extend or refund this underlying debt, the Commission denied permission and called attention to the fact that its jurisdiction had been originally ignored when the properties were purchased. Also the Commission characterized the excessive value paid for the properties as follows:

> "At the time of the acquisition of these power properties by the (Hydro subsidiaries) SPI and HRPC neither of these corporations recognized the jurisdiction of the Commission. * * *
>
> The refunding difficulty of the present companies is the result of the price they paid in 1932 for water rights, without sanction of any public authority. It would certainly be contrary to this Commission's duty and to the law if the Commission should now prejudice the interest of future power consumers in order to help the companies out of their financial difficulty.
>
> It must not be forgotten that these water rights, which the company proposes to use for future hydroelectric developments, constitute a natural resource to the value of which the present and prior owners have made no contribution except in the comparatively small matter of storage reservoir assessments. The company's plan, however, is eventually (after redevelopment) to sell electric power at a price much higher than necessary merely to cover the development cost—the additional profit to cover return on the alleged value of the water rights. These alleged values (entirely aside from construction costs) are in the neighborhood of $150 per kw of proposed generating capacity. If the Commission were to approve a security issue on this basis, it would be construed to be the indorser, if not the guarantor of such profits. None of the evidence explains how such an act would serve the public interest and comply with the law" (R. 1171, 1191).

The record also shows that the cost of the properties to Hydro largely exceeded Paper Companies' then depreciated carrying value on their own books, which latter figure was only $19,748,701.48 (See unprinted Ex. F, p. 1). Paper Company admits a profit at R. 561. The New York Commission in its later studies of these properties, found additional depreciation chargeable thereto as of December 31, 1931, to which Hydro agreed in the amount of $1,266,991 (R. 986, 1002, 1003). Thus Paper Companies' true depreciated book value as of purchase date, was only $18,481,711 at most. At Hydro's cost, Paper Company's profit in the transaction was actually $13,315,899.39, and this in the depth of the depression. The record is replete with further factual material showing the inadequate value of these investments as compared with the purchase price which Hydro was required to pay, and also showing the resulant injury to Hydro and Class A stockholders, and the overreaching of Hydro by the Paper Companies.

The above is just a rough outline showing the general nature of the case which will be further amplified in briefs in regular course after certiorari shall have been granted.

During the interim of the S. E. C. proceedings for dissolution of Hydro, similar S. E. C. proceedings were likewise taken for the simplification of NEPA as a holding company contravening the standards of the Holding Company Act (Unprinted Ex. J., R. 1707).

In the course of these latter proceedings, hearings were held on a plan contemplating the elimination of all NEPA's intermediate holding companies and the substitution of a single holding company directly owning the stocks of all NEPA operating companies.

This first NEPA plan provided for capital structure including debt, preferred and common stock. But this

was abandoned on objection of the Utility Division of the Commission after hearing. Thereafter an amended plan was filed specifying the new company's capital as $85,000,000 of debt, and 6,695,075 common shares, with *no* preferred stock (Unprinted Ex. L, also see R. 1708-9).

Under this new plan the old NEPA common stock is to be exchanged for new company common stock in the ratio of one share of old for 65/100ths of one share of new common. Thus Hydro for its 821,799 NEPA shares—88% control—will receive 534,169 new shares, or less than 8% interest in the new company (Ex. L, p. 9).

On March 14, 1946, about three months after the entry of the District Court's acceptance of the presently controverted settlement, the Commission approved this amended plan in substance, of which this Court may take judicial notice.

> *American Legion Post v. First Natl. Bank,* 113 Fed. (2) 868;
> *Tempel v. United States,* 248 U. S. 121 at 130.

During the course of the extended hearings on the NEPA simplification, the market appraised the prospects for the old NEPA common stock, in light of the probable reorganization. The record herein shows the high price in recent years for the NEPA old common at $12 a share as reached at the date immediately preceding settlement hearing in District Court (R. 432). Previously NEPA common has sold as low as 62½¢ per share on January 4, 1943 (R. 927).

At the $12 price Hydro's NEPA investment was worth only $9,861,588 at the settlement date, against cost of $62,998,122.69—a loss of $53,136,534.69 besides the loss of all income since the year 1934.

During Hydro's ownership of the NEPA common stock its dividend receipts aggregated only $8,301,000 over the entire period the same being received in years 1929-34 (R. 420).

With respect to the water powers, the record discloses that the true earning capacity of Hydro's interest in the four New York corporations owning the powers, has been small indeed over the twelve year period 1932-1943—only 3.97% per year average, or 3.65% when benefit of consolidated income tax returns with Hydro is eliminated (R. 958).

The record also shows that Hydro in its endeavor to refinance the assumed debt upon these properties, is being required to make drastic write-downs to amortize excessive costs originally paid for the properties. The final amount of this write-down had not been established at the date of settlement hearing in District Court. But these amounts were running in excess of $8,766,991 as indicated at R. 987. They are now confirmed at considerably more, see S. E. C. Holding Co. Act Release No. 7042, December 5, 1946, of which this court can take judicial notice.

So there is no question about the fact that the detriment to Hydro from purchase of these water powers has been of substantial magnitude.

The measure of recovery in this case for Hydro's losses on these various investments can be computed as follows:

On the NEPA investment Hydro is not confined to the difference between cost and value at time of purchase. But under such decisions as *Spiegel v. Beacon Participations, Inc.*, 297 Mass. 398; *Parker v. Nickerson*, 137 Mass. 487; *Medford Trust Co. v. McKnight*, 292 Mass. 1; *Prudential Ins. Co. v. McCarter*, 271 Mass. 132; *Hotaling v.*

Leach, 247 New York 84; *Singleton v. Harriman,* 152 Misc. (N. Y.) 323, affirmed 241 App. Div. 857, Hydro is entitled to recover consequential damages, resulting from continued holding of the investment and resultant decline to this date. Hydro's recovery on the NEPA investment including Massachusetts 6% interest rate, would thus calculate:

Investment cost		$ 62,998,122.69
Interest from est. average purchase date 12-31-29 to 12-31-45, 16 yrs. @ 6%		60,478,270.00
Total cost and interest		$123,476,392.69
Deduct salvage—		
Dividend receipts to mid-year 1934 (R. 420)	$8,301,000	
Interest on same from 1-1-32 est. average date of receipt @ 6%	6,972,000	
Present value NEPA Common at $12.00 per share	9,861,588	
Total salvage deduction		25,134,588.00
Balance net recovery on NEPA		$ 98,341,804.69

On the water powers Hydro is entitled under the Massachusetts case of *Fardy v. Buckley,* 231 Mass. 377, to recover Paper Company's profits in the transaction, represented as the difference between Hydro's cost and Paper Company's true depreciated book value. Also under the Federal authorities, including the Federal Water Power Act, the true value of these properties, measured at the legally required carrying values binding upon Hydro, can only be considered as Paper Company's own original cost.

United States v. Appalachian Elec. Power Co., 85 L. Ed. 243 at 259 and 261 *et seq.*;

Pennsylvania Water, etc. Co. v. Federal Power Commission, 123 Fed. (2d) (App. D. C.) 155, 163; certioarari denied 86 L. Ed. 1205;

Oklahoma v. Atkinson, 85 L. Ed. (June 1941) 1487 at 1499;

Louisville Gas & Elec. Co. v. Federal Power Commission, 129 Fed. (2d) (C. A. A. 6) 126 at 130; certiorari denied 87 L. Ed. 1133, 1164.

That the underlying depreciated cost as of date of Paper Company's sale to Hydro was the proper cost for the properties, binding upon Hydro, see

Niagara Falls Power Co. v. Federal Power Commission, 137 Fed. (2d) (C. C. A. 2) 787; cert. den. 88 L. Ed. 477 and 492.

See also,

Federal Power Commission opinion, re Niagara Falls Power, 44 P. U. R. (N. S.) 291.

Thus the measure of damage recovery on the water powers transaction, on basis of the ordinary rule, difference between cost and value at purchase date, is $13,315,899.39 plus 6% interest in Massachusetts, $11,185,355.48, or a total of $24,501,254.87.

In short summary, all of these investments in NEPA stock and 1932 water powers were acquired by Hydro from its parent companies under pressure of parent companies' domination and control. This fact is succinctly expressed in a brief of Utilities Division of the S. E. C. at R. 975 where the Commission was speaking particularly of the water power purchases. However, the same conclusions are applicable also to the NEPA investment. Thus the Commission stated:

"With all due respect to the gentlemen who made up the Board and who made up the purchase committee, the fact cannot be overlooked that the voting control of Hydro was held by the International Paper Company interests. • • • To call the purchase of these assets anything other than a transaction between affiliates and one not at arm's length would be to close one's eyes to the realities of the situation. We reiterate that the transaction had to be consummated, and consummated on terms satisfactory to the International Paper Company interests" (R. 975).

ARGUMENT

I.

In cases where the relation of parent and subsidiary companies is shown, it is well established that the burden of defending the fairness of challenged transactions between the parent and subsidiary rests upon the parent. To sustain this burden the parent must show the complete fairness of the transactions and adequacy of consideration, from the subsidiary's point of view. Unless the parent can sustain this burden the subsidiary is entitled to full compensatory relief.

> "Their (controlling stockholders') dealings with the (subsidiary) corporation are subjected to rigorous scrutiny, and where any of their contracts or engagements with the (subsidiary) corporation is challenged, the burden is on the * * * (controlling) stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the view point of the (subsidiary) corporation and those interested therein. * * * The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. *If it does not, equity will set it aside.*"
>
> *Pepper v. Litton,* 308 U. S. 295 at 306; 84 L. Ed. 281 at 289.

See also,

May v. Midwest Refining Co., 121 Fed. (2d) (C. C. A. 1) 431;

United Hotels Co. v. Mealey, 147 Fed. (2d) (C. C. A. 2) 816;

Pennsylvania Canal Co. v. Brown, 235 Fed. (C. C. A. 3) 669 at 684; cert. den. 242 U. S. 646;

Ross v. Quinnesec Co., 227 Fed. (C. C. A. 6) 337;
Hyams v. Calumet & Hecla Co., 221 Fed. (C. C. A. 6) 529 at 537;
Geddes v. Anaconda Co., 254 U. S. 590 at 599;
Lebold v. Inland Steel Co., 125 Fed. (2d) 369 at 373; cert. den. 86 L. Ed. 1749, 316 U. S. 675;
Consolidated Co. v. Dubois, 312 U. S. 510, 522; 85 L. Ed. 982 at 991.

Massachusetts decisions are in entire accord, viz:

Buckman v. Elm Hill Realty Co., 312 Mass. 10;
Lazenby v. Henderson, 241 Mass. 177;
Old Dominion Copper Co. v. Bigelow, 203 Mass. 159 at 178.

Furthermore the directors of a corporation cannot represent it in transactions with another corporation of which latter they are stockholders, officers, directors, agents or attorneys.

From the Massachusetts Spiegel-Beacon Participations case:

> "The directors of an ordinary business corporation * * * are bound to act with absolute fidelity. * * * They cannot be permitted to serve two masters whose interests are antagonistic."

Spiegel v. Beacon Participations, 297 Mass. 398 at 410.

See also the following cases:

Corry v. Barre Granite Co., 91 Vermont 413 (Shareholders);
Timber Lands Assn. v. Neace, 92 W. Va. 196 (Directors and shareholders);
Keenan v. Eshelman, 120 A. L. R. (Del.) 227 (Directors); 2 At. (2nd) 904;

Miner v. Belle Isle Ice Co., 93 Mich. 97 (Directors and Shareholders);

Sacajawea Co. v. Skookum Lbr. Co., 116 Wash. 75 (Directors);

North Confidence Co. v. Fitch, 208 P. 328 (Attorney);

Marcuse v. Broad-Grace Corpn., 101 A. L. R. (Va.) 217, 180 S. E. 327;

In re Webster Loose Leaf Co., 240 Fed. 779 (Attorney);

19 Corpus Juris Secundum, Corporations, §§ 749(c) and 805.

There is no question of the disastrous financial consequences incurred by Hydro upon the purchase of these investments. They cannot be justified as fair and reasonable. These investments were imposed upon Hydro through superior force of its parent companies, and Hydro is entitled to appropriate relief.

II.

On the measure of recovery the record is clear that Hydro's recoverable damages would aggregate $131,859,059.56. The settlement figure of $10,000,000 is only 7.5% of the prospective recovery and is wholly inadequate even if rescission be not secured. Under the cases cited and calculation contained at page 33 *supra*, Hydro would have been entitled to a net recovery of damages on the NEPA transaction in the amount of $98,341,804.69 including interest, and after allowance of all proper deductions in Paper Company's favor for salvage by way of interim income and present value of this investment at the accounting date.

On the water powers Hydro is entitled to recover as damages, Paper Company's profit in the amount of $13,315,899.39 together with interest thereon to the accounting date, six per cent in Massachusetts, calculated at $11,185,355.48 to date of December 31, 1945. Total damage recovery on the water powers thus becomes $24,501,254.87.

The settlement also required Hydro and its subsidiaries to give Paper Companies release of certain Canadian profits (R. 337) as realized by Paper Companies' Canadian subsidiaries on the sale of assets to Hydro's Canadian subsidiary Gatineau. These profits comprised the following as shown at R. 293:

Profit on the April, 1931 sale.....	$3,600,000
Profit on sale of 1491 shares, Eddy Company	1,300,000
Total Canadian profits.....	$4,900,000
Interest on the above from Dec. 31, 1941 to Dec. 31, 1945 at 6% is.....	4,116,000
or a total of.....	$9,016,000

on the Canadian transactions.

Thus the grand total of liability which the settlement compromised, calculates as follows:

On the NEPA investment.....	$ 98,341,804.69
On the 1932 water powers.....	24,501,254.87
On the Canadian transactions.....	9,016,000.00
Total,	$131,859,059.56

The percentage of settlement to indicated full recovery is less than 7.5%—clearly inadequate as shown by such decisions as

Cohen v. Young, 127 Fed. (2d) (C. C. A. 6) 721 at 726.

III.

Paper Companies' defenses as disclosed in its answer in the Brickley case, and the previous derivative case are not substantial.

(1) On the contest of personal jurisdiction of the Massachuetts courts over the Paper Company, it has already been decided in both the Brickley case in Massachusetts State Court and in the Ladd case in the Federal District Court, that Paper Company was amenable to process in Massachusetts (R. 358, and 48-59).

Present Paper Company had been admitted to transact business in Massachusetts as a foreign corporation and had appointed the Commissioner of Corporations, its agent for the service of process. On May 18, 1943 the Paper Company sought to file with said Commissioner a purported revocation of the Commissioner's appointment, and then sold its Massachusetts plant to a subsidiary, thereafter continuing transaction of an interstate business only within Massachusetts.

The original appointment by the Paper Company of the Massachusetts Commissioner of Corporations as statutory agent was made under provision of Mass. G. L. chap. 181, providing for the appointment of such agent,

> "upon whom all lawful processes in any action or proceeding against it may be served * * * (which appointment) shall continue in force so long as any liability remains outstanding against the corporation in this commonwealth."
>
> *Ann. Laws Mass.*, Vol. 6, ch. 181, sec. 3, p. 61.

Under this statute foreign corporations were suable in Massachusetts on all types of claims whether arising *inside or outside* the territorial limits of the state.

Johnston v. Trade Ins. Co., 132 Mass. 432;
Trojan Corp. v. Green Mountain Power Co., 293 Mass. 377;
Canadian Pac. R. Co. v. Sullivan, 126 Fed. (2d) (C. C. A. 1) 433.

Hydro's claim in this case against Paper Company had been a claim outstanding in Massachusetts against the Paper Company prior to May 18, 1943. Hydro was a resident of Massachusetts as a voluntary trust association, title to whose assets was held by Old Colony Trust Company, a Massachusetts corporation (R. 60). Hydro's claim was thus outstanding in Massachusetts prior to May 18, 1943.

London Guarantee & Acc. Co. v. Woelfle, 83 Fed. (2d) (C. C. A. 8) 325 at 329.

The Court of Appeals in the present case indicated at R. 1729 that Federal Supreme Court decisions might impose a limit upon the scope of State Court jurisdiction against a foreign corporation under the circumstances here involved, citing *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U. S. 573.

But this Hunter case involved a situation under the statute of North Carolina where the court of that state had limited the power of attorney as applicable only to causes of action arising within North Carolina. In the Federal opinion, the court expressly distinguished the Massachusetts statute and cases, such as *Johnston v. Trade Ins. Co.*, 132 Mass 432, *supra*. See federal opinion at page 588.

Furthermore, all the causes of action in the present case under the record showing, arose within the State of Massachusetts where Hydro had its office and where the transactions in controversy were consummated (R. 620, 1311, 1313).

(2) On the question of laches and limitation, the Massachusetts decision in *Old Dominion Copper Co. v. Bigelow*, 203 Mass. 159 at 201, clearly establishes that limitations and laches do not begin to run against a plaintiff in Hydro's position until after the time when the defendant parent corporation surrenders control of the plaintiff.

See also:

Whitten v. Dabney, 171 Cal. 621, and like cases.

In the instant situation Paper Companies did not surrender their control probably until June 16, 1941, and it is clear that such control was not surrendered earlier than January 31, 1939 when Paper Companies transferred their Class B and common Hydro shares carrying voting control to Paper Companies' trustees (R. 1029, 1030). All the several suits which were compromised by this settlement were commenced within six years following January 31, 1939.

Also in Massachusetts the rule is clear that the statute of limitations and laches do not start to run in the favor of a fiduciary such as Paper Company in the present case, until the beneficiary discovers the existence of its cause of action. In Massachusetts the fiduciary owes the duty of disclosure, so that continued silence in violation of that duty amounts to fraudulent concealment.

Connelly v. Bartlett, 286 Mass. 311 at 318;
Atlantic Natl. Bank v. Harris, 118 Mass. 147;
Old Dominion Copper Co. v. Bigelow, 203 Mass. 159 at 201.

In the present case the Court of Appeals indicated that the existence of the Federal Trade Commission Report might possibly charge Hydro and its shareholders with knowledge of its contents (R. 1732). But the Sixth Circuit

Court of Appeals in a previous decision in this general controversy, held that Hydro stockholders were not charged with notice of the contents of this report until the same had been actually brought to their attention.

Todd v. S. E. C., 137 Fed. (2d) (C. C. A. 6) 475 at 479.

(3) Also the defense of ratification is insubstantial. Under Massachusetts law a majority of stockholders cannot ratify transactions such as these.

Von Arnim v. American Tube Works, 188 Mass. 515, 518.

Brewer v. Boston Theatre, 104 Mass. 378 at 395.

See also:

Keenan v. Eshelman, 120 A. L. R. (Del. Sup.) 227, 2 A. (2d) 904.

The defense of ratification in the present case is rested only on a majority stockholder vote (P. 566), upon an occasion when the majority stock voted, comprised stock belonging to Paper Companies, which Paper Companies' own proxies voted in the meeting (R. 1030).

(4) Paper Company also cited in defense, a provision in the trust indenture creating Hydro, eliminating the existence of any fiduciary relation on the part of stockholders in their dealings with Hydro (R. 566).

In the Massachusetts decision of *Peterson v. Hopson*, 306 Mass. 597 at 610, such a defense was overruled.

Furthermore, this exculpatory provision was included in the trust indenture by virtue of the authorship of Paper Companies themselves without notice to Hydro stockholders. Defendant admitted authorship by its admission,

"that IP&P caused the Declaration of Trust of IHES (Hydro) dated March 25, 1929 * * * to be executed" (R. 548).

Also the courts do not enforce exculpatory clauses of this type to create immunity on the part of the trustee from acts of gross negligence or acts done in bad faith.

Browning v. Fidelity Trust Co., 250 Fed. (C. C. A. 3) 321 at 325.

And lastly, this exculpatory clause operated only to remove a fiduciary duty from Hydro stockholders in their mere capacity as stockholders. It did not remove any immunity resulting from stockholders' self-dealing with the corporate assets. In this respect the situation is no different from the case of corporate stockholders who do not, as such, carry a fiduciary status but are nevertheless charged with the fiduciary status if they undertake to engage in self-dealing with the corporate assets.

Mairs v. Madden, 307 Mass. 378 at 380;
Flint v. Codman, 247 Mass. 463, 472;
Lee v. Fiske, 222 Mass. 424;
Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673 at 689;
Lebold v. Inland S. S. Co., 82 Fed. (2d) (C. C. A. 7) 351 at 353-4;
Southern Pac. Co. v. Bogert, 250 U. S. 483 at 492.

(5) Another defense of the Paper Company was the fact that the NEPA stock was largely purchased by Hydro at a time when Paper Companies were the only stockholders of Hydro. *Hayes v. The Georgian*, 280 Mass. 10 was cited in support of the defense. But this case is inapplicable to the present situation inasmuch as the whole plan of Hydro's creation indicated the intent on the part of the promoters to make a public sale of Hydro's securities, then

and in the future, on the basis of which Hydro would sell its own shares direct to the public, in addition to any shares sold originally to the Paper Companies. The case thus comes within the ruling of *Old Dominion Co. v. Bigelow*, 203 Mass. 159, where the Court said:

> "A review of the authorities seems to demonstrate that there is a liability of the promoter to the corporation *when further original subscribers to capital stock contemplated as an essential part of the scheme of the promoters*, came in after the transaction complained of, even though that transaction is known to all the then stockholders, that is to say, to the promoters and their representatives."
>
> *Old Dominion Co. v. Bigelow*, 203 Mass. 159 at 178 *et seq.*

See also:

> *Hollander v. Breeze Corp.*, 26 A. (2d) (N. J. Ch.) 507 at 514; aff. 26 A. (2d) (N. J. Ct. Err. and App.) 522.

As this Court will be informed in more adequate detail, in the final briefs to be filed after certiorari herein is granted, the record in the present case is replete with evidence that this public sale by Hydro of its securities direct to the public, was originally contemplated as part of the initial promotion scheme (R. 610, 611, 1421, 1433, 276, 277, 280, 777, 1582—Unprinted Ex. 3A sub. Ex. B and C, pp. 5-7).

The Court of Appeals in this case did not undertake to look into the facts and thus satisfy itself as to the inapplicability of the Hayes-Georgian decision. Instead it expressed an unanalyzed doubt as to whether the defense could be overcome and thus justified, *inter alia* the acceptance of the settlement. But had the Court examined the

facts as clearly shown in the record, no doubt on the point would have existed whatever.

(6) In general all these defenses aside from personal jurisdiction over defendant, comprise the typical defenses that have been raised and discredited over the years in cases of this type. All of them have been generally rejected, and a careful examination by the Court of Appeals in this case under the record facts would have resulted in similar rejection here.

As just one more example of the misunderstanding of the Court of Appeals, that Court stated at R. 1732:

> "The appellants tell us that Paper Company's domination of Hydro's board did not cease until 1939 and that the actions are well within the six year period after that. On the other hand, the Paper Company says there is no basis for contending that some of the directors (notably Mr. Arthur E. Childs and Mr. J. Howard Leman) have ever had any disqualification. They have been members of Hydro's board since early in the year of 1931. As a matter of fact Mr. Childs had objected originally to the purchase of the water properties and was largely responsible for the bargaining done regarding this purchase. Knowledge of all the directors of misconduct which would justify a cause of action is surely not necessary in a case of this kind in order that those not dominated shall do their duty with regard to the rights of the security holders who are being imposed upon.
>
> We give no expression of our view on the question whether the actions were timely brought. We do agree with the Trustee that the question is not a clear nor easy one" (R. 1732, Vol. 5).

This quotation implies that participation in Hydro corporate actions by directors Childs and Leman, not shown to be disqualified, is effective either to validate such

action, or at least to fix a date commensurate with these directors' then knowledge of the facts, as to when the statute of limitations and laches commenced to operate.

These implications and conclusions thereon are wholly erroneous.

Thus, the following is stated in a recent decision by the Federal Second Circuit Court of Appeals:

> "Appellant next contends that the issue of the directors' breach of their fiduciary obligation was met by the fact that the contract was expressly made subject to the approval of an independent director, Rooney. Rooney was not at the meeting, but was then elected to fill a vacancy. He had no direct interest in appellant, and was at the time acting as attorney for First Trust Company of Albany, holder of the third mortgage on the hotel property. This claim is obviously without merit. *Rooney could not have bound the debtor without the other directors, and it was their initiative and approval which constituted an essential part of the transaction. It is their fiduciary obligation which the District Court properly scrutinized.*"
>
> *United Hotels v. Mealey,* 147 Fed. (2d) (C. C. A. 2) 816 at 819.

And on the phase of the knowledge of the independent directors, which might start the limitation or laches period, the Massachusetts law is clear that so long as Hydro remained in control of a board of directors elected by the Paper Company, the running of this period would not commence.

> "So long as the plaintiff was wholly in the power of the defendant, it could not be charged with knowledge. Mere lapse of time is no bar to relief under these circumstances. Nor is the statute of limitations a bar."

Old Dominion Copper Co. v. Bigelow, 203 Mass. 159 at 201.

The California case of *Whitten v. Dabney* contains an analysis of this last cited principle pointing out its corollary, that laches on the part of one stockholder or director cannot bind another, viz:

> "A stockholder who institutes it sues purely as a trustee to redress corporate injuries. He has the unquestioned right to sue, but it is in no sense his duty to sue. An individual stockholder may be put upon notice that his corporation has been defrauded. Indeed, complete disclosure of these facts may be made to him. He gives consideration to the time, trouble, and expense of the litigation and the loss in which he would be involved if he failed to prevail, and decides that he will not begin the suit. Some years afterwards another stockholder for the first time gains knowledge of these same facts and institutes the action. It is susceptible of demonstration that the first stockholder knew of all these matters, and that as to him this right of action may be barred. Is this also a bar to the prosecution of the same action by another stockholder who has acted promptly upon learning of the fraud? Clearly this cannot be so. So long as the corporation itself remains under disability and is powerless to act by virtue of the fact that its control is in the hands of a board of directors accused of participation in the frauds, the statute of limitations does not run against it."

Whitten v. Dabney, 171 Cal. 621.

To the same effect is the New Jersey decision in *Endicott v. Marvel,* 81 N.J. Eq. 378, affirmed 83 N.J. Eq. 632.

IV.

Neither the District Court nor the Court of Appeals undertook to make any analysis of the merits of Hydro's cause of action nor of the defenses thereto. Particularly, the District Court failed to support its decision by

> "findings in such detail and exactness as the nature of the case permits, *of subisidiary facts on which the ultimate conclusion of fairness* (of settlement) *can rationally be predicated.*"
>
> *Kelley v. Everglades District,* 319 U.S. 415 at 420.

Absent such findings of fact and conclusions of law, it was the duty of the Court of Appeals either to reverse the case and remand to District Court for findings and conclusions, or in the alternative to make its own considered decision upon the record as a whole, without any presumptions of special weight attaching to discretionary rulings on the part of the court below.

The duty of the District Court to file findings of fact and conclusions of law is prescribed by Rule 52(a) of Rules of Civil Procedure, which provides:

> "(a) In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."
>
> *Rule 52(a),* 28 U. S. C. A., secs. 721-723, West Publn. Edn. p. 677.

However, the Court of Appeals at R. 1735, 1736 held the present matter, and presumably all decisions of the District Courts in holding Company act enforcement cases, do not constitute trials on issues of fact. Rather that the practice in such cases is governed exclusively by Rule 66 of the Civil Procedure Rules, prescribing that

practice in the administration of estates by receivers and by other similar officers appointed by the court, shall be in accordance with the practice *heretofore* followed in the courts of the United States, etc.

Rule 66, 28 U. S. C. A., secs. 721-723, West Publn. Edn. p. 740.

In the petition proper for certiorari herein, we have cited the rules and cases indicating that findings of fact and conclusions of law were required in this case.

Even though this controversy is a receivership matter, findings, etc., in receivership cases, were required prior to the adoption of the Rules of Civil Procedure. We also directed the attention of the Court to the reason for such findings, in order that the appellate courts should have a clear understanding of decisions under review. Particularly the appellate courts needed to know whether such decisions were based on the lower court's view on determinative questions of law, reviewable on appeal, or otherwise, upon a permissible discretion in relation to a matter of fact or expediency.

See *Sparks v. Mellwood Dairy,* 74 Fed. (2d) (C. C. A. 6) 695 at 696, where the point is made that the reviewing court is entitled to know

> "whether the (lower) court acted upon its view of a determinative question of law, reviewable upon appeal, or (otherwise) upon a permissible discretion in relation to a matter of fact or expediency."

In the present case the lower court's decision does not show its basis, whether resting upon a question of law or matter of discretion. But the Court of Appeals treated the decision as one of discretion and assigned as reason for affirmance, the fact that no abuse of discretion had been shown (R. 1735).

But such affirmance in light of the present record, is wholly erroneous. Appellants before the Court of Appeals, and petitioners here, were and are entitled to a record of findings and conclusions by the District Court *which would indicate the basis of decision.* Absent such findings by the District Court, the Court of Appeals was not warranted in affirming, except as the latter court made its independent review of the record and analysis of the case. The appellate court was not warranted in reviewing on the limited scope for abused discretion only, as there were nowhere contained in the lower court's decree any discretionary findings upon any subsidiary fact or issue.

Knapp v. Imperial Oil Co., 130 Fed. (2d) (C. C. A. 4) 1 at pp. 3 and 4.

See also the following cases indicating the duty of the Court of Appeals to reverse and remand for findings and conclusions, viz:

Mayo v. Lakeland Co., 309 U. S. 310, 84 L. Ed. 774;

Railroad Commission v. Maxcy, 281 U. S. 82, 74 L. Ed. 717;

Panama Mail SS. Co. v. Vargas, 281 U. S. 670, 74 L. Ed. 1105;

Siano v. Helvering, 79 Fed.(2d) (C. C. A. 3). 444;

Bowles v. Russell Packing Co., 140 Fed. (2d) (C. C. A. 7), 354;

Edwards v. Holland Banking Co., 75 Fed. (2d) (C. C. A. 8), 713;

Humphrey v. Helgerson, 78 Fed. (2d) (C. C. A. 8), 484;

Woodruff v. Heiser, 150 Fed. (2d) (C. C. A. 10), 869;

Bach v. Friden Co., 148 Fed. (2d) (C. C. A. 6), 407.

And see also the following cases which hold that the Court of Appeals in the alternative instead of remanding for findings, etc., had the right to examine the record ab initio.

Knapp v. Imperial Oil Products, 130 Fed. (2d) (C. C. A. 4), 1;

Sbicca-Del-Mac v. Milius, 145 Fed. (2d) (C. C. A. 8), 389;

Lemm v. Northern California Bank, 93 Fed. (2d) (I. C. C. A. 9), 709).

And the fact is obvious that if the Court of Appeals in the present case had undertaken the alternative course, of examining the record for itself ab initio, it was bound itself to make the equivalent of the findings, etc., which the lower court should have made. Otherwise appellants are forever deprived of the findings of subsidiary controlling facts. And right now in this case, we do not have any fair or adequate appraisal whatever by either of the lower courts of the various points on which this settlement actually depends.

CONCLUSION

Wherefore it is respectfully submitted that writ of certiorari in this case should be granted.

HOWELL VAN AUKEN,
Attorney for Petitioners,
Osmond Y. Ladd and
Paul H. Todd.
1603 Ford Building,
Detroit 26, Michigan.

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

OCTOBER TERM, 1946.

No. 4167.

OSMOND Y. LADD, ET AL.,
APPELLANTS,
v.
BARTHOLOMEW A. BRICKLEY, TRUSTEE, ET AL.,
APPELLEES.

CONSOLIDATED APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE MAHONEY, GOODRICH AND WOODBURY, JJ.

Howell Van Auken for appellants.

B. A. Brickley and *Frank B. Wallis*, with whom *Samuel Hoar* and *Edward R. Langenbach* were on brief for B. A. Brickley, Trustee, appellee; *Morton E. Yohalem*, Counsel Public Utilities Division, with whom *Roger S. Foster*, Solicitor *Robert S. Rubin*, Assistant Solicitor, *Alexander Cohen*, Attorney and *Robert F. Krause*, Public Utilities Division, were on brief for Securities and Exchange Commission, appellee; *John L. Hall*, with whom *John W. Davis, Richard Wait, Ralph M. Carson, Choate, Hall & Stewart, and Davis, Polk, Wardwell, Sunderland & Kiendl* were on brief for International Paper Company, appellee; *Joseph Nemerov* for Ethel Kresberg et al., appellees; and *Archibald Palmer, Friedman, Atherton, King & Turner*, and *Bennett E. Aron* on brief for Mildred Howard, appellee.

OPINION OF THE COURT.

November 14, 1946.

GOODRICH, J. This appeal from the judgment of the District Court for the District of Massachusetts brings before

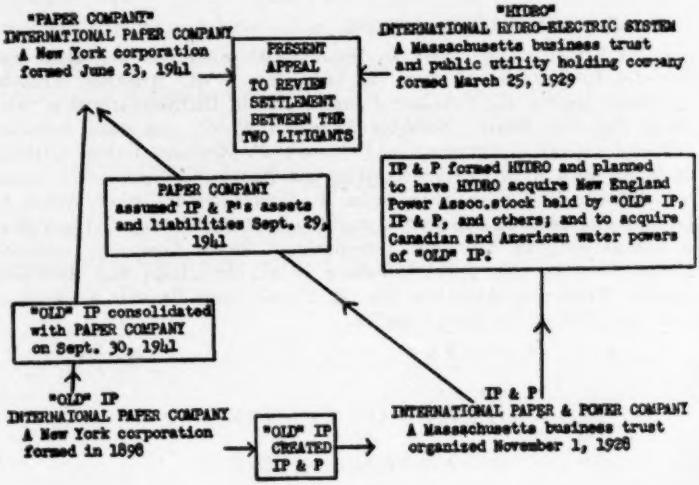
us the propriety of that court's approval of a settlement in an important matter of corporate reorganization.

The affairs of International Hydro-Electric System (hereinafter called Hydro) are involved. This company is a holding company and its reorganization under the Public Utility Holding Company Act of 1935[1] is in the District Court.

Hydro was formed by a predecessor of International Paper Company (hereinafter called Paper Company).[2] To simplify reference to the corporate relationships we shall speak of Paper Company as though it had been in continuous existence while the acts complained of arose. The legal significance of this assumption will be subjected to analysis later. A charge that International Paper Com-

[1] 49 Stat. 838 (1935), 15 U.S.C. Chap. 2C, § 79 (1940 Ed.).
[2] Diagram of Corporate Relations.

DIAGRAM OF CORPORATE RELATIONS



pany had improperly manipulated Hydro to its own use and to the loss of Hydro's security holders was made with such force that the District Court appointed a member of the Massachusetts Bar, Bartholomew A. Brickley, Esq., to make an investigation. Subsequently, Mr. Brickley became Trustee in the reorganization proceedings. With the help of the Securities and Exchange Commission (hereinafter called S.E.C.) a thorough investigation was made. The conclusion reached by the Trustee was that enough facts had been uncovered to call for the institution of legal proceedings against the Paper Company. Suit was started in the Massachusetts State Court; also in the United States District Court for the District of Massachusetts. Before these actions came to trial on the merits, long negotiations were had between the parties looking to settlement. The Paper Company's original offer of $500,000 was, in the course of subsequent negotiations, eventually increased to $10,000,000 plus the agreement of Paper Company to lend one of Hyrdo's companies $3,000,000. This was subject to the provision that a clearing agreement be had with the Bureau of Internal Revenue with regard to Paper Company's income and excess profits tax liability for the money thus paid out. This clearance was subsequently obtained and the money paid into court. The District Judge has approved the settlement; so has the S.E.C. and the majority of those interested in the company. A group of junior security holders, however, are not satisfied with the amount obtained and bring this appeal alleging an error in the approval of the settlement above described. They figure that potential claims of the plaintiff in the actions total $131,859,059.56. They say that a settlement for only 7½% of this amount is not the kind of settlement which the court in the exercise of discretion can properly approve.

There are two main points on this appeal. The first one has to do with the form in which the District Court's con-

clusion appears. There were no formal findings of fact and conclusions of law. The decree recited: "That the court hereby determines that the compromise provided for in that certain agreement * * * between Bartholomew A. Brickley, solely as he is trustee of International Hyrdo Electro System * * * and International Paper Company * * * is for the best interests of the estate of said System, that the consideration payable thereunder to said System is fair, reasonable, and adequate and that adequate notice and opportunity to be heard has been given to all persons interested, and the court hereby approves said agreement * * *." It concluded with specific directions for the execution of the agreement.

The appellants say that this is insufficient. They prefer to have the Court of Appeals make its own findings of fact, but in lieu of that say the case must go back to the District Court for findings.

Aside from this argument on the procedural point, they say that the amount paid in settlement, although it may seem a lot of money to a judge, is so disproportionate to the amount which Hyrdo is entitled to recover against Paper Company that the approval of the settlement was an abuse of discretion on the part of the District Judge. This last argument is coupled with a group of minor arguments such as: The fact that the District Judge did not take as long to consider the case as the appellants now think he should have taken;[3] and the fact that according to the appellants the District Judge relied on the Master

---

[3] Note, however, that on October 11, 1943, Judge Ford, of the United States District Court for the District of Massachusetts, appointed Mr. Brickley as special counsel for investigation of Hydro's claims against its parent companies; and on November 13, 1944, after receiving Mr. Brickley's report, Judge Ford appointed him as trustee of Hydro with orders to commence a lawsuit against the parent companies. Judge Ford had "lived with" this set of facts for over two years prior to authorizing an agreement to compromise.

and the S.E.C. recommendation instead of using his own head. We do not intend to take up these minor points individually because we think this whole litigation turns on the main question of whether it was within the discretion of the District Judge to approve the settlement proposed.

To this end we shall consider some of the points which both Paper Company and the Trustee have brought up as indicating the lines of defense which the Paper Company would have brought forward, had the actions brought by the Trustee against the Paper Company been pursued. We shall not, of course, commit ourselves to an answer on the merits of these defenses. It will be enough if it appears that they have the ring of reality about them. Nor will we labor the point, since its truth is obvious, that a defendant only has to make good on one defense to win a lawsuit.

General Considerations in Approval of Settlement

There are two or three circumstances not involved in the individual defense which should be mentioned. Before the Massachusetts actions were brought by Mr. Brickley there had been some legal advice on the question of Paper Company's liability to Hydro. This question had been raised by a security holder named Todd who had become a Director of Hydro sometime after the acts complained of had taken place. Two opinions were rendered. Each opinion advised against bringing an action on the basis that a successful recovery could not be reasonably anticipated. The opinions were signed, respectively, by the firm of Ropes, Gray, Best, Coolidge & Rugg and Robert G. Dodge, Esq. The authority carried by a document bearing the name of either of these signers is too well recognized to require elaboration in this opinion. Mr. Brickley had the benefit of seeing these memoranda. It was only after several months of investigation of the facts, assisted

by the S.E.C., the advantage of which the signers of these opinions did not have, that Mr. Brickley concluded and reported to the Court that he thought that discovered facts were sufficient to justify legal proceedings against Paper Company. The Trustee still thinks, however, and we agree, that the opinions thus rendered by eminent counsel to the effect that the establishment of liability was improbable may properly be considered as one of the elements on a very practical matter of the settlement of a disputed claim.

Another general element to be considered on the question of acceptability of a settlement is the attitude of the people who were financially interested in the affairs of the company. Hydro during its corporate life had issued securities which consisted of (1) debentures; (2) preferred stocks; (3) A stock; (4) B stock; and (5) common stock. Some of the preferred stock has been retired.[4] The B stock and the common stock were sold to Paper Company's parents in 1929 for $10,000,000 cash and over $19,000,000 of stock and assigned claims. This stock has been washed up in the financial reorganization, brought about by the S.E.C., and the entire issues of B and common stock were cancelled for the nominal consideration of $1.00.[5] Facts presented to the court reveal the following mathematical classification of the disapproving security holders:

1) 0.2% of the debenture holders (owning 9.3% of all debentures) disapprove.

2) 6% of the preferred stockholders (owning 29% of that stock) disapprove.

---

[4] From May, 1930 to April, 1941, 144,799 shares of preferred stock had been issued. In August, 1930, Hydro repurchased 2,000 shares of the preferred stock issue.

[5] Trustees of Hydro executed cancellation order of the S.E.C. (8 SEC 485 (1941) on August 8, 1941.

3) 9% of the class A stockholders (owning 19% of that stock) disapprove.

These objections were registered by counsel and by reply postcards, that had been mailed along with a letter of protest of the settlement by Todd to all security holders, after Brickley had given official notice of the hearing for approval of the settlement. Todd held 31% of all the class A stock owned by the dissenting A stockholders. The overwhelming majority of the security holders in this enterprise either approve of, or at least do not disapprove of, the settlement.*

It is to be noted, also, that the vigorous opposition to the settlement comes from the holders of A stock, although there, too, the opposition comes from a minority of about 19% of the total number of shares. We do not know how well off the debenture holders will be if $10,000,000 is added to Hydro's assets. It is clear, of course, that they will benefit before the A stockholders do. It is equally clear that, to the extent that the A stockholders can embark the corporate enterprise on long and expensive litigation, they will have a run for other people's money, the result of which, if rosy hopes are realized, will be a profit to them. But the risk will be on the holders of the senior securities. This element, like the majority vote in favor of settlement, is not conclusive, but is one of the items which may be properly considered.

The third general point worth consideration is this: The staff of the S.E.C. has spent a very great deal of time in investigating the affairs of Hydro as part of its public

* This court directs attention to the fact that persons holding Hydro securities either had knowledge or means of knowledge of the examination of the financial structure of Hydro and attempts to improve its stability and usefulness. Various proceedings had been taking place before the S.E.C. ever since June 17, 1940 for this purpose.

function.[7] At the hearing before this Court the Commission unqualifiedly endorsed approval of the settlement. No court worth its salt will willingly make itself a rubber stamp for approving administrative Commission action. But the studied conclusion of an expert body which has made a prolonged investigation of a subject from the standpoint of the public interest is to be taken seriously. The affirmative recommendation of the Commission is therefore an element to be considered in assessing the wisdom of the settlement.

Points of Defense Alleged to Be Available to Paper Company

1. Is there Personal Jurisdiction over Defendant?

It will be remembered that the Trustee has started two lawsuits against Paper Company in Massachusetts, one in the State Court[8] and one in the Federal Court.[9] Paper Company says it is not in court in those actions. The Superior Court Judge in the state suit decided against Paper Company on this point, but evidently impressed with the importance of the question involved, reserved the case for report to the Massachusetts Supreme Judicial

---

[7] As early as June 17, 1940, the S.E.C. had investigated Hydro's corporate structure and caused the cancellation of the class B and common stock, mentioned supra. Hearings were continued, and on July 21, 1942, the S.E.C. ordered Hydro to liquidate and dissolve. Todd contested this order. The order was upheld in *Todd v. Securities and Exchange Commission*, 139 F. (2d) 700 (C.C.A. 6, 1943). On August 12, 1943, S.E.C. instituted action, out of which this appeal grows, in the United States District Court because Hydro asserted that it could not comply with the S.E.C. order without assistance by the court.

[8] Commonwealth of Massachusetts Superior Court, in Equity No. 56916.

[9] District Court of the United States for the District of Massachusetts, Civil Action No. 3280.

Court. At this time there is no information regarding the report. The District Court, in the suit of Hydro against Paper Company withheld its decision pending a decision of the Massachusetts Supreme Judicial Court upon this problem of personal jurisdiction.

The question arises in this wise: Paper Company, subsequent to the 1929 and 1932 acts complained of by Hydro and prior to the running of the Statute of Limitations, was undoubtedly engaged in business in Massachusetts. Pursuant to a Massachusetts statute,[10] it designated an agent upon whom process in actions against it could be served. Before the lawsuits against it began Paper Company had withdrawn from local business in Massachusetts and revoked the authority of this agent.

Assume, for the moment, that Paper Company is no longer carrying on any activities in Massachusetts. Can it be held subject to suit in that State on a claim which arose before the authority of the agent to receive process was revoked?

It is settled that a state may make provision for suit in its courts against a foreign corporation which once did business there, but which has now ceased to do so.[11] This statement of power of a state, however, is usually, perhaps always, coupled with the proviso that the claim

---

[10] Mass. G. L. (Ter. Ed.) c. 181, § 3. "Commissioner to be appointed attorney for service of process. Every foreign corporation, which has a usual place of business in this commonwealth, *** shall before doing business in this commonwealth, in writing appoint the commissioner and his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the corporation, and that the authority shall continue in force so long as any liability remains outstanding against the corporation in this commonwealth.* * *"

[11] *Washington v. Superior Court*, 289 U.S. 361 (1933).

sought to be sued on arose out of the business done by the corporation in that state.[12] Can a state subject a corporation to suit after it has ceased to do business in a state for a claim not arising out of the business done there? In the first instance the answer to such a question is a matter of local law, here Massachusetts. If Massachusetts says that its statute does not cover such a set of facts the corporation does not need to invoke anything more than the statute and the Massachusetts court's interpretation thereof to hold it not amenable to such a suit in that State. There is Massachusetts authority which looks in that direction with regard to the set of facts similar to those involved here.[13] The matter is not, however, one finally to be determined by Massachusetts law. There is the further question of what limitations the United States Supreme Court will impose to limit the scope of state court action against a foreign corporation under the circumstances here involved. And, here, there is authority from that Court which gives support to a limitation of the state's power to suits on claims arising out of the business which was done by the corporation in the state in question.[14]

Did these claims by Hydro against Paper Company arise out of the Paper Company's activity in Massachusetts? That is, at least in part, a question of fact and we have had no trial on the facts. Hydro started its life as a Massachusetts business trust. Therefore, perhaps one can say that any loss suffered by the business entity, as distinguished from the loss of individual security holders, was suffered there. But the inter-relations of

---

[12] Restatement, Conflict of Laws (1934) § 93; Restatement, Judgments (1942) § 30, comment d.

[13] See *Tucker v. Columbian National Life Ins. Co.*, 232 Mass. 224, 228, 122 N.E. 285, 286 (1919).

[14] *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U.S. 573 (1910).

Hydro and the Paper Company were not confined to Massachusetts transactions. Indeed the properties which Hydro complains that Paper Company sold to it at inflated values were scattered around through New England and down into New York. It is a very difficult question to try to decide whether Hydros complaint is based on transactions arising out of the Paper Companys Massachusetts activities.

Paper Company has ceased to do local business in Massachusetts. It does have representatives there who solicit offers from Massachusetts prospects looking to transactions which are completed by the shipment of goods in interstate commerce. The Massachusetts court has said that such solicitations is not such doing of business in Massachusetts as to make a foreign corporation subject to suit there.[15] We now know that systematic canvassing by travelling salesmen who solicit offers for inter-state sales can constitutionally subject the employing company to liability for a state's unemployment compensation fund.[16] That is not the same thing as saying that a lawsuit may be pursued against the foreign corporation under the same set of facts. But here the fact that the state court has ruled that such solicitation does not constitute doing business on which to found suit settles the question adversely to the plaintiff and the foreign corporation seeking to evade litigation in that state does not need to try out the question of its constitutional protection against such litigation.[17] It looks, therefore, as though

---

[15] *Thurman v. Chicago, Milwaukee & St. Paul Ry. Co.*, 254 Mass. 569, 151 N.E. 63 (1926).

[16] *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945).

[17] *Thurman v. Chicago, Milwaukee & St. Paul Ry. Co.*, 254 Mass. 569, 151 N.E. 63 (1926); *Reynolds v. Missouri, Kansas & Texas Railway*, 224 Mass. 379, 113 N.E. 413 (1916).

the current activities of Paper Company in Massachusetts form no basis for holding it amenable to suit in Massachusetts courts. The significance of its past activities has already been discussed above.

Another method of approach to this complicated problem may be had in tracing the corporate history of present defendant. It was set up as a New York corporation by a combination of a New York corporation and a Massachusetts business trust. The new corporation, Paper Company, present defendant, assumed liabilities of its parents. It is arguable and it has been argued here, that this assmption of liability was a New York act and not a doing of business in Massachusetts at all. If that argument should be accepted the support for Massachusetts jurisdiction against a child of that union, that is the present Paper Company, become thinner and thinner. We are not inclined to accept the correctness of this agrument without exceedingly careful consideration. We mention it, however, as an additional factor which we, or any court, would have to treat and dispose of before final disposition could be made on the question of whether Paper Company is subject to suit in Massachusetts for the claims involved.

The conclusion to be drawn from this perhaps too detailed discussion of the jurisdictional point is that it is full of interesting and difficult legal questions. Any one of them would make a good moot court case and the decision of any one by a court might be made the subject of a legal essay and rate a paragraph in a learned treatise. But since the function of the Trustee here is not to enrich the literature of the law, but to use his best efforts in getting as much as he reasonably can for the benefit of Hydro, it is clear to us that the difficulties involved in the jurisdictional point are very strong factors

to be considered in the practicability of the terms of the settlement.

2. Are the Actions Barred?

Paper Company contends very vigorously that they are. The Trustee says that there is no certainty that they are not. The appellants necessarily take the position that the actions are timely.

The Massachusetts Statute of Limitations applicable in both law and equity is six years. There is another section which provides that where one "* * * fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action".[18]

The acts complained of by Hydro against Paper Company began in 1929 and ended in 1932 with the acquisition of certain properties located in Maine, New Hampshire and New York (hereinafter called New York properties). The lawsuits begun by the Trustee were started in 1943. It is obvious that the action will be barred unless it can be brought under the concealment exception to the running of the statute. It is also clear now that the plaintiff will have no advantage on this aspect of his case in the federal court over what he has in the state court. Since these suits were begun the Supreme Court has decided the important case of *York v. Guaranty Trust Co.*, 326 U.S. 99 (1945), which is conclusive authority for the statement just made.

Were the lawsuits in question to be tried, the points coming up under the statute would, therefore, have to

[18] Mass. G. L. (Ter. Ed.) c. 260, § 12.

do with whether factually and legally plaintiff's case can be brought under the fraudulent concealment exception. In this connection it is to be noted that there was a Federal Trade investigation of Hydro in 1931 and that report has been available since 1931. Are all shareholders, and especially the directors, charged with the information contained in this public document which concerns their company? The appellants tell us that Paper Company's domination of Hydro's board did not cease until 1939 and that the actions are well within the six year period after that. On the other hand, the Paper Company says there is no basis for contending that some of the directors (notably Mr. Arthur E. Childs and Mr. J. Howard Leman) have ever had any disqualification. They have been members of Hydro's board since early in the year of 1931. As a matter of fact Mr. Childs had objected originally to the purchase of the water properties and was largely responsible for the bargaining done regarding this purchase. Knowledge of all the directors of misconduct which would justify a cause of action is surely not necessary in a case of this kind in order that those not dominated shall do their duty with regard to the rights of the security holders who are being imposed upon.

We give no expression of our view on the question whether the actions were timely brought. We do agree with the Trustee that the question is not a clear nor easy one. The uncertainties residing in it were clearly suffcient to be a relevant and important element in determining the advisability of settlement.

2. The Question of Promoter's Profits.

This question is concerned with the 1929 acquisition by Hydro from Paper Company of an interest in the New England Power Association securities. Paper Company created Hydro and sold it these securities. Paper Com-

pany advanced money to Hydro and took back obligations issued by Hydro. Out of this transaction it is charged that Paper Company made an inordinate profit at the expense of Hydro's security holders. It is to be noted that the argument regarding this point does not touch the 1932 transactions as to New York properties. It does, however, affect the New England Power Association stock transaction which was the largest item in the list of complaints which Hydro makes against Paper Company.[19] To the extent that a claim based on this New England transaction is subject to defense or a scaling down of damages claimed, the amount involved in the settlement comes closer to being the actual amount which could have been recovered in favorable litigation.

Appellants naturally stress *Old Dominion Copper Co. v. Bigelow*[20] to furnish the rule which they say applies where promoters mulct the corporation promoted for their own benefit and to the cost of the security holders. To the extent that Massachusetts law controls, the Bigelow case would, of course, be applicable both to the suit in the Massachusetts court and the United States court. But both the Trustee and Paper Company stress the limiting Massachusetts decision of *Hayes v. The Georgian, Inc.*[21]

So in litigation the question before a court would be whether Paper Company is liable on the promoter's doctrine in the Bigelow case or whether this transaction between Paper Company and its creation, Hydro, was not just a matter of shifting of money and securities back and forth in the same corporate family and thus brought

[19] Appellants contend that the loss to Hydro by this purchase was $53,136,534.69, plus loss of income on said stock since 1934.

[20] 203 Mass. 159, 89 N.E. 193 (1909).

[21] 280 Mass. 10, 181 N.E. 765 (1932).

under the limitations of *Hayes v. The Georgian, Inc.* The appellants say that it is not so; that a public offering was contemplated, although they admit that the Georgian case is one that is to be taken very seriously in connection with this problem.

Here, again, we are not called upon to answer the question. All through these various arguments we are endeavoring to bear in mind the point that whatever facts were dug up in the Trustees' investigation were necessarily found ex parte. Mr. Brickley can report to the court what he thinks he could prove. But he has no way of knowing what countervailing facts could be brought out by the defendants when their side of the case is presented. So, here, if it could be established that the facts are not such as to bring the case under the doctrine of the Georgian case it might well be that the Bigelow decision could prevail in full force. But there can be no possible doubt that the question of which one of these doctrines is applicable is a highly important one with regard to the recovery concerning the New England transactions. We think the answer is doubtful and that doubtfulness is a proper element to take into consideration concerning the desirability of a proposed settlement.[22]

---

[22] The Ropes, Gray, Best, Coolidge & Rugg Report, on p. 578 of the Transcript of Record, comments upon the difficulty of proving facts at a trial of this case as follows: "In this investigation we have had the advantage of examining many documents which ordinarily would not be available because compiled by the company against whom the court action would be had. These records were available only because International Paper was formerly the parent of IHES [Hydro], and duplicates were supplied to IHES of important papers of International Paper. It should be noted, however, that much of this material might well be inadmissible as evidence should this case come to trial."

Conclusion After Application of Available Defenses to the Settlement Question.

The briefs and argument in this case have not only covered the questions discussed above, but some others as well. For instance, there is the problem of possible ratification of the transactions. There is appeal to the "business judgment" rule. It is suggested that there are difficulties of great magnitude in connection with the valuations of the properties acquired by Hydro from the Paper Company. We do not think that either the interest of the parties or the interest of the public would be benefited by a further discussion of these points by this Court. What has been said above is sufficient to show that the questions involved in the litigation begun by the Trustee are hard and complicated both in facts to be proved and law to be applied. $10,000,000 does not look so large when it is set up against $131,000,000 by a skillful advocate. The Court still thinks that $10,000,000 is a great deal of money. The District Judge told the Trustee it was proper to take the bird in hand instead of a prospective flock in the bush. Our consideration of the case convinces us that there was no abouse of discretion in so deciding.

APPLICABILITY OF RULE 52(a).

The appellants argue that the District Court erred in failing to follow the mandate of Rule 52(a) of the Federal Rules of Civil Procedure. The applicable language is: "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment * * *"[23] We think there are at least two answers to appellants contention here.

I The first answer is that the court did find such facts as the nature of the case permitted. What was before the court? It was not the decision upon the facts or law involved in the two lawsuits brought by the Trustee, Mr. Brickley. It was the determination of whether or not in view of all the issues involved in those cases the settlement was for the best interests of the estate being administered under its direction. The court in its decree of December 26, 1945 found, inter alia, "That the court hereby determines that the compromise provided for * * * is for the best interests of the estate of said System [Hydro] that the consideration payable thereunder to said System is fair, reasonable, and adequate and that adequate notice an dopportunity to be heard has been given to all persons interested * * *." These are findings of fact. They are ultimate facts, truly, and represent a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate. We do not see just what more could be asked for. Certainly the court was not reuqired to put its guess as to the probable success of each claim and defense into a formally stated conclusion.

---

[23] Fed. Rules Civ. Proc. § 52(a), 28 U.S.C.A. § 52(a) (1941).

The second answer is that we do not think Rule 52(a) is applicable to this case. It would have been applicable in the case brought in the District Court by the Trustee against Paper Company, had that case been litigated to a conclusion. But in the cause which is now before us the court was not trying issues on facts; it was administering an estate under the provisions of a federal statute, the Public Utility Holding Company Act of 1935. Mr. Brickley, as Trustee, was in a position similar to that of a receiver. The provision of the Federal Rules applicable to such situation is Rule 66,[24] not Rule 52(a).

Our conclusion is that there was no failure on the part of the court to comply with the provision of the Rules of Civil Procedure.

The judgment of the District Court is affirmed.

[24] Fed. Rules Civ. Proc. § 66, 28 U.S.C.A. § 66 (1941).

FILE COPY

FILED

FEB 3 1947

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,

vs.

BARTHOLOMEW A. BRICKLEY, Trustee of
International Hydro Electric System,
SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents

REPLY BRIEF FOR PETITIONERS

HOWELL VAN AUKEN,
Attorney for Petitioners,
1603 Ford Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., Case Bldg., 457 Fort St. W., Detroit 26, Mich.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,

vs.

BARTHOLOMEW A. BRICKLEY, Trustee of
International Hydro Electric System,
SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents

REPLY BRIEF FOR PETITIONERS

Without attempting in this short reply, to answer all of the errors in respondents' opposition briefs, their more important claims can be answered as follows:

1. Their principal contention that the approval of this settlement was an *administrative matter purely,* concerning which no supporting findings of fact and conclusions of law were required, is clearly wrong.

A leading case on the point is *Macdonald v. Aetna Indemnity Company,* where the court, having jurisdiction of Aetna's receivership, had authorized the receiver to compromise Aetna's claims against Munich Reinsurance Company. Certain creditors of Aetna appealed, and the court said:

> "The receivers moved to erase this appeal, assigning as reasons: (1) that the order appealed from was not the proper subject of appeal, and (2) that the appellants were not entitled to take an appeal therefrom.
>
> In support of the first proposition it is alleged that an appeal could not be predicated upon the order *because it was not in the nature of a judgment, and did not involve the determination of any question of law or fact in issue, but was rather an order made in the exercise of the court's discretion in respect to a purely administrative matter.* The opinions of this court in *Guarantee, etc., Deposit Co. v. Philadelphia R. & N. E. R. Co.,* 69 Conn. 709, 714, 38 Atl. 792, and in *Links v. Connecticut River Banking Co.,* 66 Conn. 277, 283, 33 Atl. 1003, furnish a complete answer to these contentions. * * * See also *Trustees v. Greenough,* 105 U. S. 527, 531, as to the appealable character of the order."

In this case also, the Court outlined the issues which are presented for decision on settlement approvals, viz.:

> "The field of inquiry covers the subject of the probable validity of the claim made by the receivers, the apparent difficulties, if any, likely to attend an attempt to enforce it in the courts, the collectibility of a judgment obtained, the delays likely to be involved, the importance of these delays, the expense likely to be incurred, and the amounts involved in respect to both assured recovery and surrender.

"For the most part these are purely practical considerations. At points, however, some of them touch legal questions quite closely. This is particularly true of the matter of the validity of the claim which is the subject of the proposed compromise. That is an important factor in the situation. No intelligent conclusion, as to the wisdom or unwisdom of the proposed compromise, can be arrived at which does not take it into account. And yet the question of validity, important as it is, is not in issue. Its decision is not called for, and none could be made which could possess any other importance than as expressing a personal view. It would bind nobody, and conclude nothing. *The inquiry which the trial court was called upon to make had, and that which we are now to make has, no other purpose and possesses no other importance than the ascertainment in a general way of the probable or possible result of litigation of the claim.*"

Macdonald v. Aetna Indemnity Co., 88 Conn. 571.

See also the following cases to similar effect, viz.:

In re Ortiz Estate, 27 A. 2nd (Del. Ch.) 368;
Gordon v. Hartford Sterling Co., 319 Pa. St. 174.

The Macdonald-Aetna case was cited and followed by the Second Circuit Court of Appeals in *West v. Radio Keith Orpheum*, 70 Fed. 2nd (C. C. A. 2) 621 at 624.

The foregoing tests for judging a compromise settlement, present the issues involved, that is, the "subsidiary issues" of the case, as that term was used in the *Kelly-Everglades* case—319 U. S. 415 at 420.

And of course, it is only reasonable that receivership compromises, where substantial rights of the interested parties are concluded, should be treated on the same basis as other contested issues.

2. The point is made in some of the respondents' briefs that the Securities and Exchange Commission approved this settlement, to which special weight should be attached.

The fact is that the Commission did not make any independent study of its own, respecting the desirability of accepting the settlement. Mr. Yohalem, representing the Commission before the District Court, stated:

> "Now, the Commission has not undertaken to examine these claims, and therefore the Commission is not expressing a judgment on them; and it would seem to me that there would be no purpose served for this record to show any more specific analysis on my part, and it would be a purely personal analysis of the merits of the claims or the defenses. I of course cannot profess to be, and would not want to be taken in this court to be, an expert on the law applicable to the case" (R. 466).

(3) The point is also made by one of the respondents that all of Hydro's junior securities were sold to the Paper Companies and not directly to the public in any case. See particularly, Mr. Brickley's brief, pages 3 and 4. At top of page 4, it is stated that petitioners make no reference to the record in support of their statement that "the whole plan of Hydro's creation indicates the intent to make a public sale of Hydro's securities."

The record shows that Paper Companies in purchasing Hydro Class A stock, and reselling to the public, were acting as Hydro's agent for that purpose. (See letter, R. 279, 280.)

See also testimony of Mr. Archibald R. Graustein, the gentleman who was both president of Hydro and of the two Paper Companies at the time when Hydro securities were first issued, viz.:

"Q. Now when you authorized the issuance of Class A stock, wasn't it intended that if it became necessary to sell that stock for the purposes of the System, that the stock would be sold?

A. Yes.

Q. Now, I will go further and wasn't it intended to be sold, as you first intended to sell the Class A stock, by selling it to the public?

A. If I understand the question correctly, it was. That is the public was our natural market for the Class A stock" (R. 1582).

When the need arrived six months after Hydro's organization, for additional capital, 265,000 Class A shares were sold in September 1929 for $12,985,000. Hydro tried to interest underwriters for a direct sale to the public, but the underwriters were unwilling to make a firm commitment for more than 50,000 shares. Hence Paper group formed an underwriting organization, International Paper & Power Securities, Inc., which bought these 265,000 shares and then distributed same to the public (R. 276).

Again six months later, it was desired to issue still more Hydro capital stock, this time to buy in the bonds of United Electric Railways Company, a subsidiary of New England Power Association.

Evidently at this time, after the market crash in 1929, it was no longer feasible to sell Class A stock—so a security senior to the Class, A was created—the so-called $3.50 convertible preferred stock.

142,799 shares of convertible preferred were issued, of which 119,799 shares were issued in exchange for the bonds of United Electric, to the public direct without any intervening transfer to Paper Companies. Said bonds as thus acquired were then sold by Hydro to NEPA for $6,788,815.00—which sum was immediately taken out of

Hydro's pocket and turned over to Paper Company on the open account (R. 277).

The original sale of 475,000 Class A shares at Hydro's organization was consummated under an agreement between International Paper and Power Company whereby the latter, in capacity of underwriter, distributed the stock immediately to the public. Paper Company under this arrangement guaranteed Hydro a minimum price of $41.00 a share, *together with the payment to Hydro of any excess of Paper Company's sale proceeds, less expenses.* (Exhibit D in Exhibit 3-A, pages 2 and 3 in unprinted portion of the record.)

Under this distribution, many original certificates for various quantities of Hydro shares were issued directly to the public stockholders (R. 610).

4. Respondents also made the point that failure of the District Court to make findings of fact and conclusions of law was cured by the findings and conclusions contained in Appellate Court's opinion. The complete answer to this contention is the fact that the appellate court did not make any findings of the nature required of the District Court.

On the contrary, the Appellate Court decided the case "on the main question of whether it was within the discretion of the District judge to approve the settlement proposed" (R. 1724).

And after concluding that the settlement acceptance was a discretionary matter, the Appellate Court then affirmed, because—

> "Our consideration of the case convinces us that there was no abuse of discretion (*i. e.,* by the lower court) in so deciding" (R. 1735).

In reaching these conclusions, the Appellate Court decided the subsidiary points, first, that findings of fact and conclusions of law were not required of the lower court (R. 1736), and second, that if findings were required, then that the single recital in the judgment and decree was sufficient (R. 1735).

It is disclosed in our main brief and petition, that the Appellate Court was wrong on both these phases concerning findings and conclusions. Also that the presumptions on review of the validity of discretionary rulings below, cannot be indulged, absent sufficient findings and conclusions by the lower court to show factual basis of such discretion. As stated in the Kelly-Everglades Case—

> "We hold only that there must be findings, stated either in the Court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusions."
>
> 319 U. S. 415 at 422.

And so far as concerned specific findings on the several tests for evaluating compromises, the Appellate Court in no instance analyzed particular points nor indicated its views as to probable validity of Hydro's claim or defenses thereto. In fact the Court frequently said that it did not indicate any views on such points, *e. g.*, the following:

On jurisdiction over defendant's person, the Appellate Court said it was not inclined to accept the correctness of defendant's main argument "without exceedingly careful consideration" (R. 1731). But this point was not analyzed further with any reference to the particular facts and applicable law.

On the defense of laches and limitations, the Court said:

> "We give no expression of our views on the question whether the actions were timely brought" (R. 1732).

On the question of the Hydro entity cause of action under the Hayes-Georgian Case, 280 Mass. 10, the Appellate Court simply said:

> "Here again we are not called upon to answer the question" (R. 1733).

On the defenses of ratification as well as justification of these investments under the "business judgment" rule, the Appellate Court simply said:

> "We do not think that either the interest of the parties or the interest of the public would be benefited by further discussion of these points by this Court" (R. 1734).

In other words, no analysis of these and other critical points nor statement of the relevant facts of record, was made by the Court of Appeals.

Nowhere in this case have petitioners ever secured from any court, any considered findings of fact and conclusions of law upon the points for testing this compromise. The record contains abundant evidence of gross sharp practice and overreaching, perpetrated on Hydro by the International Paper Companies and their controlling stockholders, Chase National Bank of New York, the then Phipps family, etc. If this court does not allow the present review, the sordid book of Paper Companies' spoliation of its great public utilities subsidiary and thousands of investors therein, will be forever closed. For a comparative pittance, the Paper Companies will have escaped their just liabilities and the derelictions of big business, again condoned.

Respectfully submitted,

HOWELL VAN AUKEN,
Attorney for Petitioners,
1603 Ford Building,
Detroit 26, Michigan.

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Statement of the Case 2

Question Presented 5

Summary of Argument 6

POINT I—Petitioners have failed to show any grounds for the allowance of a writ of certiorari 6

POINT II—The District Judge, in approving the compromise, exercised a broad discretionary power, and the judgments of the courts below should not be reversed in the absence of a persuasive showing of gross and arbitrary abuse, and more particularly since the record clearly shows that the District Judge acted for the best interests of the International Hydro-Electric System 8

CONCLUSION—There is no principle of law which suggests or requires the reversal of the judgment of the courts below, and that under the law and on the basis of the record, no reason exists for the allowance of a writ of certiorari, and that the petition should accordingly be denied 13

CASES CITED

	PAGE
American District Steam Co. v. Waltermire, 231 Fed. 412	9
Boehmer v. Pennsylvania Railroad Company, 252 U. S. 496	7
Burns Bros., In re, 14 Fed. Sup. 910	8
Chicago Junction Ry. v. King, 222 U. S. 222	7
Drexel v. Loomis, 35 F. (2d) 800	9
Forsyth v. Hammond, 166 U. S. 506	6
Houston Oil Company of Texas v. Goodrich, 245 U. S. 440	7
McCrory Stores Corporation, In re, 14 Fed. Sup. 739	8
National Artificial Silk Co., In re, 272 Fed. 938	9
Orinoco Corp., In re, 269 F. 344; cert. den. Baxter v. Safford, 256 U. S. 694	7, 8
Pullman Couch Company v. Eshelman, 1 F. (2d) 885; cert. den. 266 U. S. 631	7, 8
Prudence Co., In re, 98 F. (2d) 559; cert. den. Stein v. McGrath, 306 U. S. 636	7, 8
Riggi Bros Co., In re, 42 F. (2d) 174; cert. den. Wood & Selick v. Todd, 282 U. S. 881	7, 8, 9
Van Camp Products, In re, 95 F. (2d) 206; cert. den. Shubrick v. Van Camp Products Co., 305 U. S. 605	7, 9
West v. Radio-Keith-Orpheum, 68 F. (2d) 869	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,

vs.

BARTHOLOMEW A. BRICKLEY, Trustee of International Hydro-Electric System, SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MILDRED HOWARD, A HOLDER OF PREFERRED STOCK OF INTERNATIONAL HYDRO-ELECTRIC SYSTEM, INTERVENOR-RESPONDENT

Opinions Below

The District Court rendered no opinion. There were no formal findings of fact and conclusions of law. The opinion of the Circuit Court of Appeals was filed November 14, 1946, but is not yet reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on or about November 19, 1946. Petition for certiorari was filed on December 30, 1946. The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code, as amended, by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347-A.

Statement of the Case

The petition for a writ of certiorari filed by petitioners, Osmond Y. Ladd and Paul H. Todd, stockholders of the International Hydro-Electric System, seeks a review of the judgment of the Circuit Court of Appeals for the First Circuit, affirming a judgment of the United States District Court for the District of Massachusetts, which approved a settlement of certain lawsuits against the International Paper Company.

On November 13, 1944, Bartholomew A. Brickley was appointed by the Hon. Francis J. W. Ford, Judge of the District Court of the United States for the District of Massachusetts, Trustee of International Hydro-Electric System, and was directed to proceed to take such steps as were necessary to institute suit against International Paper Company, based on the cause or causes of action which International Hydro-Electric System may have against International Paper Company.

Thereafter the said Trustee carried on an extensive investigation and under date of November 1, 1944, filed a report setting forth the results of the said investigation and recommended that under appropriate orders from the Court, International Hydro-Electric System institute legal proceedings against International Paper Company in the Courts of the Commonwealth of Massachusetts, or in the United States District Court for the District of Massa-

chusetts, by intervening in litigation then pending, or by a bill in equity for rescission, or, in the alternative, damages, or for other equitable relief by an action at law for damages or by both a bill in equity and an action at law.

Thereafter, on or about January 25, 1945, the said Trustee instituted a certain action in the District Court of the United States for the District of Massachusetts (Civil Action No. 3280) against International Paper Company and Old Colony Trust Company, as Trustee of International Hydro-Electric System.

On or about January 27, 1945, the Trustee likewise commenced a certain suit in equity in the Massachusetts Superior Court for Suffolk County against the same defendants, wherein essentially the same relief was sought.

The Trustee in the lawsuits hereinabove referred to sought to rescind certain transactions relating to the sale of International Hydro-Electric System in 1929 and 1930 for shares of stock of New England Power Association and the sale in 1932 of certain water power, and, in the alternative, damages in the sum of approximately $96,000,000, together with interest.

At the time Bartholomew A. Brickley was appointed Trustee, as aforesaid, there were pending in the District Court two certain actions against International Paper Company and Old Colony Trust Company, as Trustee for International Hydro-Electric System, the first having been brought by Osmond Y. Ladd on or about July 19, 1943 (Civil Action No. 2405), and the other having been brought by Janet M. Condon on or about August 3, 1943, in the Superior Court for Suffolk County, but subsequently removed to the District Court (Civil Action No. 2503). The plaintiffs-shareholders of International Hydro-Electric System instituted the actions in the representative capacity of such shareholders in the right of International Hydro-Electric System.

Thereafter the said Trustee and officials of International Paper Company carried on negotiations for a long period

of time with a view of effecting a compromise and settlement of the litigation instituted by the said Trustee. On November 13, 1945, the Trustee entered into a certain agreement with International Paper Company, subject to the approval of the Court, providing terms and conditions for the disposal of all of said litigation. Under the terms of the said agreement the International Paper Company agreed to pay to the estate of International Hydro-Electric System the sum of $10,000,000, and further agreed to purchase from Hudson River Power Corporation, a subsidiary of International Hydro-Electric System, second mortgage bonds at par in the principal amount of not to exceed $3,000,000 and when, as and if issued by said corporation.

Thereafter, and on November 23, 1945, the Trustee filed in Civil Action No. 2430 a petition asking for approval of the settlement agreement and authorization to carry it out, and in his District Court action (Civil Action No. 3280) a suggestion asking for an order of notice with reference to the settlement, and in the *Ladd* and *Condon* cases a motion that he be permitted to intervene as a party plaintiff solely for the purpose of having the actions dismissed in accordance with the settlement agreement. In compliance with the order for notice issued by the District Court on the petition, the Trustee on November 24, 1945, mailed notice of the hearing set for December 17, 1945, to all interested parties. The District Court heard these motions beginning December 17, 1945, and continuing into three court days. Approval of the settlement was recommended by the Trustee by the Securities and Exchange Commission and by various holders of securities of International Hydro-Electric System. The settlement of the litigation was opposed by the petitioner Ladd and a small number of other security holders. A majority of the debenture holders, holders of preferred stock and holders of Class A stock in both number and amount were in favor of the settlement.

The District Court on December 26, 1945, approved the settlement and entered the decree and judgment appealed from. The decree in Civil Action No. 2430 recited that the settlement was for the best interests of the estate of International Hydro-Electric System and that the consideration was fair, reasonable and adequate. The agreement was approved and the Trustee was given the necessary authorization to consummate the settlement. Furthermore, it provided, among other things, for a dismissal of the *Ladd* case and the Trustee's District Court case subject, however, to a condition subsequent, which would reinstate them in the event that the compromise settlement was not consummated. A consent decree with a similar condition subsequently was entered in the Trustee's state court suit. International Paper Company paid the $10,000,000 to the District Court clerk, and executed and delivered the agreement to purchase the Hudson River Power Corporation bonds. Since the entry of the decree and judgment of the District Court the closing agreement has been received by the International Paper Company from the Treasury Department and all conditions to the settlement to be fulfilled by International Paper Company subsequently have been met.

On appeal the Circuit Court of Appeals affirmed the judgment of the District Court and on November 25, 1946, an order was duly made and entered staying the mandate until December 30, 1946.

Question Presented

Have the petitioners shown any grounds warranting the allowance of a writ of certiorari?

Summary of Argument

I—Petitioners have failed to show any grounds for the allowance of a writ of certiorari.

II—The District Judge, in approving the compromise, exercised a broad discretionary power, and the judgments of the courts below should not be reversed in the absence of a persuasive showing of gross and arbitrary abuse and more particularly since the record clearly shows that the District Judge acted for the best interests of the International Hydro-Electric System.

POINT I

Petitioners have failed to show any grounds for the allowance of a writ of certiorari.

A careful study of the questions presented at page 5 of the petitioner's brief shows clearly that no novel principle of law or question of public interest is involved and that there is no conflict between Circuit Courts of Appeals. There are not present in this case any of the grounds which the prior decisions of this Court have held were essential to move it to grant a writ of certiorari. The questions presented by the petitioner are not of the character that this Court has ruled must exist before it will exercise its power to review.

Forsyth v. *Hammond,* 166 U. S. 506, 514, 515 (1897).

Whether or not the compromise should have been approved depended essentially upon the appreciation by the District Judge of the questions presented, the difficulties of proof and probabilities of success or failure under the circumstances.

In *Houston Oil Company of Texas* v. *Goodrich*, 245 U. S. 440 (1918), the Court said:

> "The propriety of submitting these matters (to the jury) depended essentially upon an appreciation of the evidence. Having heard it all, the Trial Court concluded there was not enough in support of any one of petitioners' above stated claims to warrant a finding in their favor and the Circuit Court of Appeals reached the same result. 226 Fed. Rep. 434. The record discloses no sufficient reason within the rule long observed why we should review the judgment below."

The same rule was applied in *Boehmer* v. *Pennsylvania Railroad Company*, 252 U. S. 496, 498 (1920), in which case the question was whether certain acts of the carrier constituted negligence. Mr. Justice McReynolds, speaking for the Court, said:

> "Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances where two courts have agreed we will not enter upon a minute analysis of the evidence." *Chicago Junction Ry.* v. *King*, 222 U. S. 222.

The petition for a writ of certiorari should be denied on the authority of:

In re Riggi Bros. Co., 42 F. (2d) 174, 176; cert. den. *Wood & Selick* v. *Todd*, 282 U. S. 881.

Pullman Couch Company v. *Eshelman*, 1 F. (2d) 885; cert. den. 266 U. S. 631.

In re Orinoco Corp., 269 F. 344; cert. den. *Baxter* v. *Safford*, 256 U. S. 694.

In re Prudence Co., 98 F. (2d) 559; cert. den. *Stein* v. *McGrath*, 306 U. S. 636.

In re Van Camp Products, 95 F. (2d) 206; cert. den. *Shubrick* v. *Van Camp Products Co.*, 305 U. S. 605.

POINT II

The District Judge, in approving the compromise, exercised a broad discretionary power, and the judgments of the courts below should not be reversed in the absence of a persuasive showing of gross and arbitrary abuse, and more particularly since the record clearly shows that the District Judge acted for the best interests of the International Hydro-Electric System.

The authorities are unanimous in holding that a District Judge, in the exercise of jurisdiction over the affairs of a corporation, either in receivership or bankruptcy, has the discretionary power to approve the settlement and compromise of claims. The power has been frequently exercised in proceedings under Section 77-B.

In re Prudence Co., 98 F. (2d) 559 (C. C. A. 2, 1938).
In re McCrory Stores Corporation, 14 Fed. Sup. 739.
In re Burns Bros., 14 Fed. Sup. 910.

The existence of this power can hardly be denied. Therefore the real question presented here is whether in exercising his power the District Judge abused his discretion. All of the cases, including the action of the Circuit Court of Appeals in this case, are in harmony on this principle. Courts of review are uniformly reluctant to intrude upon the discretionary powers of the trial judge who is best qualified to appraise the conflicting contentions. This principle was applied in approving compromises in the following cases:

In re Riggi Brothers Co., 42 F. (2d) 174, 176 (C. C. A. 2, 1930).
In re Pullman Couch Co. v. *Eshelman*, 1 F. (2d) 885 (C. C. A. 4, 984).
In re Orinoco Corp., 269 Fed. 344 (C. C. A. 6, 1920).
In re Prudence Company, 98 F. (2d) 559.

That the District Judge has the right and, indeed, the duty to settle litigation has been stated by Circuit Judge Evans in the case of *In re Van Camp Products Company*, 95 F. (2d) 206, 208 (C. C. A. 7, 1938); cert. den. 59 S. Ct. 65 (1938), as follows:

> "• • • a breach of the parent company's obligation has, we think, caused counsel for appellants to overlook the unquestionable right (and we think the clear duty) of the court to settle sharply litigated questions in the interest of creditors and stockholders, although the exposure of those responsible for the unconscionable financing be not publicly made."

See also:

West v. *Radio-Keith-Orpheum*, 68 F. (2d) 869 (C. C. A. 2, 1934).
Drexel v. *Loomis*, 35 F. (2d) 800 (C. C. A. 8, 1929).
American District Steam Co. v. *Waltermire*, 231 Fed. 412 (C. C. A. 6, 1916).
In re National Artificial Silk Co., 272 Fed. 938 (C. C. A. 6, 1921).

The only action taken by the District Judge was the approval of a settlement of claims on behalf of the System. The settlement made it unnecessary to decide any questions of local or federal law. No question of general importance is presented. The consideration by the Court of the existence of disputed facts and law, the certainty of litigation and appeals and the uncertainty of their result was sustained in the case of *In re Riggi Bros. Co.*, 42 F. (2d) 174. All of the decisions which have reviewed the discretionary acts of a District Judge in approving a compromise comment upon the axiomatic fact that compromises are justified because expense and delay are thereby avoided.

In *In re Van Camp Products Company*, 95 F. (2d) 206, 209, the Circuit Court of Appeals for the Seventh Circuit commented upon the natural desire of the Court to

respect the wishes of the parties and avoid a waste of assets in protracted litigation.

The following excerpts from the record show conclusively that the learned District Court acted on reasonable grounds in approving the settlement:

BRICKLEY—Page 365

"I have little more to add, if your Honor please, except to say this, that in connection with the recommendation which I have made to your Honor I considered all the facts which were in my possession and which resulted from the investigations which I have already stated. I considered the law involved and the possibilities, the probabilities and the possibilities, and because the Hydro System matter as it is before your Honor is purely a liquidating proposition, I considered the advisability of the recommendation and the effect which a settlement would have in connection with the liquidation, the favorable liquidation of other Hydro assets which I may say to your Honor ran into several millions of dollars. I have not the slightest hesitation in saying to your Honor that in my judgment this settlement is the wise thing for the Hydro System to do. I think it is fair and reasonable and just, and for that reason I am now before you recommending it is fair and reasonable to your Honor."

BRICKLEY—Page 369

"Q. My last question. Why, in your opinion, in connection with this settlement, in view of the causes of action that you set forth in your complaint, and particularly in the amended complaint, why do you believe that $10,000,000 and the loan of $3,000,000 is fair instead of more money? A. Because I think there are very serious questions on the facts and very serious questions on the law, and that the payment of $10,000,000 at this time is such a sum as we should accept under all the circumstances."

BRICKLEY—Page 379

"Except, Mr. Whiteside, I want to make it very plain that before I made this recommendation I con-

sidered every fact which I had, which had come to me, in writing, orally, as a result of my own investigation; and I considered the law as I understood it in the application to the facts which we had. And it was as a result of those things, plus a consideration as to the likelihood of recovery, plus the beneficial or unfavorable effect upon Hydro in connection with this settlement—and I took into consideration everything that I could conceivably take, and then make up my mind as to what I should do."

BRICKLEY—Page 387

"I should say that we had a subsequent conference which resulted in our getting an offer of ten million dollars, I mean we were presented with another amount, but we sought a further conference as a result of which we were able to add to that the loan of $3,000,000 to the Hudson River Power, and I felt that when we reached that point the Paper Company would absolutely stop, and we could not get one additional dollar, and that therefore it was then incumbent upon me to report the matter to the Court and to recommend it or to refuse to recommend it."

BUCKMAN—Pages 400-401

"There is no question that every security holder would like to receive or see System receive the greatest amount of money possible from Paper Company. In the last analysis it will be for their own benefit as security holders of the corporation. I wish to point out to the court that on the preferred stock that my clients own there is an accumulation of $38.50 per share as of July 15th of this year; but at the same time, your Honor, one must keep in mind that any lawsuit has its danger. There is no such thing as certainty as to outcome. And we do know that the affairs of System are such that an offer of this amount is substantial. * * *

"In conclusion, I will reiterate the position of my clients being in consonance and consistent with the trustee's recommending this settlement."

SIEGELTUCH—Page 407

"He has directed me to say to your Honor that he approves of this settlement in toto. He feels that he cannot possibly overlook a large amount of money like ten million dollars, which is a considerable amount of money, in view of the fact that he feels that the vicissitudes of litigation are certainly such that under the circumstances in this case, with all the questions involved, the question of the statute of limitations and the question of the factual proof that might have to be gone into and the difficulties in proving them, he feels that he is serving the best interests of his client in approving this settlement."

YOHALEN—Page 461

"What I do say is that it is the view of the Commission that ten million dollars plus the other commitments brings this settlement within the area where it can be and should be approved."

YOHALEN—Page 466

"In any event, I think it is your Honor who is in that position; but, so far as I am concerned, my position on behalf of the Commission is that a figure in this magnitude, reached at arm's length by people of such eminence and qualification as Mr. Brickley, assisted by Mr. Hoar and his associates, after the kind of investigation which there has been—and that of course includes the cooperation for what it has been worth that they have had from the Commission's staff—as I say, a figure of ten million dollars arrived at that way merits the sympathetic action of the court. So I do not see how any question that Mr. Whiteside can put to me and which I might answer would be of any assistance to the court."

The Circuit Court of Appeals, after a careful study of the various contentions of the petitioners, could find nothing to justify it in reversing the judgment and decree of the District Court in approving the settlement. Naturally, we concur in the able and exhaustive opinion of the court

below. Judge Goodrich, speaking for the Court, correctly and effectively showed that the contentions made by the petitioners are entirely untenable, and under the circumstances we deem it unnecessary to discuss any further the arguments made by the petitioners in this Court in support of their position. Briefly stated, we are unable to perceive of any proper ground upon which the action of the courts below can be overruled.

CONCLUSION

There is no principle of law which suggests or requires the reversal of the judgment of the courts below, and that under the law and on the basis of the record, no reason exists for the allowance of a writ of certiorari, and that the petition should accordingly be denied.

Respectfully submitted,

ARCHIBALD PALMER,
320 Broadway,
New York City,
Counsel for Mildred Howard,
Intervenor-Respondent.

FRIEDMAN, ATHERTON, KING & TURNER,
30 State Street,
Boston, Mass.,

BENNETT E. ARON,
66 Court Street,
Brooklyn, N. Y.,
of Counsel.

FILE COPY

FILED
JAN 21 1947

Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 825.

OSMOND Y. LADD AND PAUL H. TODD,
PETITIONERS,

v.

BARTHOLOMEW A. BRICKLEY, TRUSTEE OF INTERNATIONAL HYDRO ELECTRIC SYSTEM, SECURITIES AND EXCHANGE COMMISSION ET AL.,
RESPONDENTS.

BRIEF OF RESPONDENT BARTHOLOMEW A. BRICKLEY, TRUSTEE, IN OPPOSITION TO PETITION FOR CERTIORARI.

BARTHOLOMEW A. BRICKLEY,
SAMUEL HOAR,
EDWARD R. LANGENBACH,
FRANK B. WALLIS,
Attorneys for Respondent.

ADDISON C. GEORGE & CO., LAW PRINTERS, BOSTON.

Subject Index.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Supplementary statement of facts	3
Argument	4
I. The Circuit Court of Appeals did not commit error in holding that Rule 52 (a) of the Federal Rules of Civil Procedure was not applicable, but, if applicable, had been complied with by the District Court	4
A. Rule 52 (a) was not applicable	4
1. The action of the District Court was governed by Rule 66 of the Rules of Civil Procedure to the exclusion of Rule 52 (a)	4
2. Under the practice existing prior to the adoption of the Federal Rules of Civil Procedure, the District Court, in passing upon administrative matters of the kind here involved, need not and would not have found the facts specially and stated separately its conclusions of law thereon	7
3. Rule 52 (a) was inapplicable for the further reason that there was no action "tried upon the facts"	9
B. In any event, Rule 52 (a) of the Federal Rules of Civil Procedure was complied with by the District Court	10
II. Even if Rule 52 (a) were applicable and not complied with by the District Court, the Circuit Court of Appeals committed no error in failing to remand the case to the District Court for further findings of fact and conclusions of law	11

Page

III. The Circuit Court of Appeals did not commit error in affirming the District Court settlement 13
Conclusion 17

Table of Authorities Cited.

Cases.

Bell v. Fred T. Ley & Co., Inc., 278 Mass. 60 14
Central States Electric Corp., In re, 143 F. (2d) 684 16, 17
Kelley v. Everglades Drainage Dist., 319 U.S. 415 10
Mairs v. Madden, 307 Mass. 378 14
Old Dominion Copper &c. Co. v. Bigelow, 203 Mass. 159 15, 16
Public Service Comm. of Wisconsin v. Wisconsin Tel. Co., 289 U.S. 67 10
Spiegel v. Beacon Participations, Inc., 297 Mass. 398 14, 15

Statutes.

Judicial Code, sec. 240 (a), as amended, 28 U.S.C. sec. 347 (a) 2
Public Utility Holding Company Act of 1935, sec. 11 (d) (15 U.S.C. sec. 79k (d)) 5, 6, 9

Equity Rule 70½, 281 U.S. 773 8, 9
Equity Rule 70½, 296 U.S. 671 8, 9
Federal Rules of Civil Procedure, Rule 52 (a) 2, 4, 6, 8, 9, 10, 11
Federal Rules of Civil Procedure, Rule 66 5, 6, 7

Textbook.

Note, Federal Receiverships in Massachusetts, 1929-1932, 47 Harv. L. Rev. 828, n. 16 7

Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 825.

OSMOND Y. LADD AND PAUL H. TODD,

PETITIONERS,

v.

BARTHOLOMEW A. BRICKLEY, TRUSTEE OF INTERNATIONAL HYDRO ELECTRIC SYSTEM, SECURITIES AND EXCHANGE COMMISSION ET AL.,

RESPONDENTS.

BRIEF OF RESPONDENT BARTHOLOMEW A. BRICKLEY, TRUSTEE, IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW.

The decree of the District Court recited "That the Court hereby determines that the compromise provided for in that certain agreement . . . between Bartholomew A. Brickley, solely as he is Trustee of International Hydro Electric System . . . and International Paper Company . . . is for the best interests of the estate of said System, that the consideration payable thereunder to said System

is fair, reasonable, and adequate and that adequate notice and opportunity to be heard has been given to all persons interested, and the Court hereby approves said agreement . . ." It concluded with specific directions for the execution of the agreement. The court therefore found that the compromise is for the best interests of the estate of System and that the consideration payable thereunder to System is fair, reasonable and adequate.

The opinion of the Circuit Court of Appeals for the First Circuit was filed on November 14, 1946, but is not yet reported. (The opinion of the Circuit Court of Appeals is found in the record, pp. 1721-1736.)

JURISDICTION.

Jurisdiction is invoked under section 240 (a) of the Judicial Code, as amended, United States Code, Title 28, section 347 (a).

QUESTIONS PRESENTED.

The questions presented on pages 5 and 6 of the petition logically fall into three main categories:

1. Did the Circuit Court of Appeals commit error in holding that Rule 52 (a) of the Federal Rules of Civil Procedure was not applicable, but, if applicable, had been complied with by the District Court?

2. Even if Rule 52 (a) was applicable and not complied with by the District Court, did the Circuit Court of Appeals commit error in failing to remand the case to the District Court for further findings of fact and conclusions of law?

3. Did the Circuit Court of Appeals commit error in affirming the District Court's approval of the settlement?

SUPPLEMENTARY STATEMENT OF FACTS.

On page 20 of the petitioners' brief the petitioners erroneously state "The greater part of Hydro's original cash capital, more than $48,000,000 was derived from sale to the public of $30,000,000 of debentures and 475,000 shares of Class A stock."

The true facts are that the original cash capital of Hydro was considerably in excess of $48,000,000 and was not derived from a sale of Hydro securities to the public but was obtained as follows: Hydro sold $30,000,000 of debentures to a banking syndicate (R. p. 495); International Paper and Power Company on the date of formation of Hydro, March 25, 1929, subscribed for all of the 475,000 shares of class A stock and paid Hydro therefor $19,475,000, in part on March 25, 1929, and the balance on April 17, 1929 (R. p. 609); International Paper and Power Company and the old International Paper Company on March 25, 1929, subscribed for 1,000,000 shares of class B stock and 2,000,000 shares of common stock for which they paid Hydro the equivalent in cash and property of $29,334,171.75 by April 17, 1929 (R. pp. 495, 605, 606, 656).

The petitioners erroneously state on pages 26 and 27 in their brief: "With respect to funds for the purchase of the 1932 water powers, Hydro sold an additional block of 265,000 shares of its class A stock to the public, in September 1929, realizing additional capital in the amount of $12,985,000 therefrom."

The true facts are that in September 1929, Hydro sold 265,000 shares of its class A stock, not to the public, but to old International Paper Company's affiliate, International Paper & Power Securities, Inc., for which Hydro received $12,985,000 (R. p. 276).

The petitioners at page 44 in their brief state: ". . . the whole plan of Hydro's creation indicated the intent on the

part of the promoters to make a public sale of Hydro's securities, then and in the future, on the basis of which Hydro would sell its own shares direct to the public, in addition to any shares sold originally to the Paper Companies." Petitioners make no reference to the record to support this statement, and in fact the record is to the contrary (R. pp. 1581, 609; see Contract marked "C" and "D" of Exhibit 3A, not printed but part of record). Moreover, even if such intention existed, it was never carried out.

Almost all of the New England Power Association stock and the water powers sold to Hydro had been acquired by Paper Company's predecessors prior to the formation of Hydro (R. pp. 269, 270, 488).

ARGUMENT.

I. The Circuit Court of Appeals did not commit error in holding that Rule 52 (a) of the Federal Rules of Civil Procedure was not applicable, but, if applicable, had been complied with by the District Court.

A. Rule 52 (a) was Not Applicable.

1. The Action of the District Court was Governed by Rule 66 of the Rules of Civil Procedure to the Exclusion of Rule 52 (a).

Rule 52 (a) of the Federal Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of

law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

Rule 66 of the Rules of Civil Procedure provides:

"The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."

Settlement of claims of the estate of Hydro was a mode of disposing of assets within the jurisdiction and possession of the court, for which approval of the court was required by section 11 (d) of the Public Utility Holding Company Act of 1935 (15 U.S.C. sec. 79k (d)), reading in part as follows:

"In any such proceeding [to enforce compliance with any order issued under subsection (b)], the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to

> hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets . . ."

Clearly, a trustee appointed under this section is an officer similar to a receiver within the meaning of Rule 66. Furthermore, approval of the settlement agreement and matters incidental thereto were part and parcel of the administration of the estate of Hydro by the court. Settlement of doubtful and disputed claims, like other modes of disposition of assets, such as a sale, is characteristically a business transaction. Approval or confirmation of these matters by an equity court lacks the elements of ordinary judicial action in that, whatever may be the nature of the receivership or other proceeding as a whole, such approval or confirmation, taken by itself, is not an adjudication of rights and liabilities existing between adverse parties. Rather is it supervisory action by the court of a strictly business matter designed to serve as a check upon the action of its officer. Application of fact and law-finding requirements to a proceeding of this kind is inappropriate. That is why Rule 66 exempts matters of practice in the administration of receivership and similar estates from the requirements of the Rules of Civil Procedure, including Rule 52 (a).

The petitioners erroneously state as a reason for granting their petition that the Circuit Court of Appeals has held Rule 52 (a) inapplicable to any proceedings under the Public Utility Holding Company Act (Petition, p. 7). From a reading of the opinion of the Circuit Court of Appeals it is evident that the court confined its holding as to the inapplicability of Rule 52 (a) to the approval by the

District Court of a compromise settlement before trial of litigation instituted by a trustee appointed under the Act.

Rule 66 refers the matter of findings and conclusions to the earlier practice in the federal courts, in the absence of pertinent special rules promulgated by the particular District Court. No such special rules exist in the District of Massachusetts.

2. *Under the Practice Existing Prior to the Adoption of the Federal Rules of Civil Procedure, the District Court, in Passing upon Administrative Matters of the Kind Here Involved, Need Not and Would Not have Found the Facts Specially and Stated Separately its Conclusions of Law Thereon.*

The non-existence of reported authorities declaring findings and conclusions unnecessary in connection with administrative action of a receiver or similar officer is not surprising. The point has always been taken for granted and has therefore never been raised. There must, however, be a large number of practice precedents, never reaching the books, involving approval of compromises and analogous matters, such as confirmation of receivers' sales, where no special and separate findings and conclusions were in fact stated.

> ". . . receivership proceedings seldom reach the reports. . . .
>
> "In Massachusetts, only one opinion of the District Court was reported and only two appeals were taken from orders or decrees in receiverships begun during 1929-32."
>
> Note, Federal Receiverships in Massachusetts, 1929-1932, 47 Harv. L. Rev. 828, 830, n. 16.

Prior to 1930 there were no formal rules requiring findings of fact or conclusions of law in equity proceedings of any kind. In that year this court adopted Equity Rule 70½, reading in part as follows (Appendix XVI, 281 U.S. 773):

> " 'In deciding suits in equity, . . . the court of first instance shall find the facts specially and state separately its conclusions of law thereon; . . .' "

An amendment to the Rule in 1935 added the following (Order, Rule 70½, 296 U.S. 671):

> ". . . and, in granting or refusing interlocutory injunctions, the court of first instance shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its action."

It should be observed that Rule 70½ was adopted at a time when the equity receivership had long reached its full maturity, including several decades of consent receivership in the federal courts. Receivership practice had become thoroughly established by that time. Furthermore, the Rule by its own terms was applicable only "in deciding suits in equity," obviously having reference to final decisions of such suits.

It is for the petitioners to show that findings of fact and conclusions of law were required, or at least customary, under the earlier practice in cases like that at bar. They have failed to do so. None of the cases cited by the petitioners hold that such findings and conclusions were ever required in a case of this sort. The authorities cited by the petitioners fall into three categories:

a. Bankruptcy cases, where the Bankruptcy statute requires findings to be made, and General Order in Bankruptcy No. 37 specifically makes Rule 52 (a) applicable.

b. Cases tried upon the facts, where earlier practice, then Equity Rule 70½, required, and now Rule 52 (a) requires findings of fact and conclusions of law.

c. Cases involving the granting or refusing of interlocutory injunctions, where earlier practice, then Equity Rule 70½ as amended, required, and now Rule 52 (a) requires findings of fact and conclusions of law.

The practice in equity receiverships simply takes account of realities. Findings of fact and conclusions of law are not appropriate in the discharge of the function with which the court is there concerned, and this is particularly true of an order authorizing the disposition of an asset by the receiver.

3. *Rule 52 (a) was Inapplicable for the Further Reason that there was No Action "Tried upon the Facts."*

The District Court was not trying issues on facts; it was administering an estate under the provisions of a federal statute, the Public Utility Holding Company Act of 1935. In the normal litigated case the problem is always first to determine the facts and then to apply the appropriate rule of law to the factual conclusions so reached. Rule 52 (a) is designed to have it made manifest on the record exactly how this has been done. In the receivership proceeding the function of the court is to arrive at an over-all conclusion as to whether good business judgment dictates one of two or more alternative courses, and findings are necessarily inappropriate. If "findings" were to be made, they could not possibly do more than show all of the factors which the judge took into consideration in arriving at his ultimate conclusion to approve the trustee's recommendation. Cataloguing of those considerations could not properly be described as findings of fact. Many of them would necessarily be opinions based upon the probabilities in-

herent in the trial of a case, and the whole function of a settlement is to avoid a trial of the issues, on which findings could be made.

B. In Any Event, Rule 52 (a) of the Federal Rules of Civil Procedure was Complied with by the District Court.

The Circuit Court of Appeals held that Rule 52 (a) was not applicable to the case at bar. In addition, the Circuit Court held that, even if Rule 52 (a) was applicable, its requirements were satisfied by the decree of the District Court. The petitioners claim that this holding is probably in conflict with decisions of this court, and petitioners cite—

> *Kelley* v. *Everglades Drainage District,* 319 U.S. 415;
>
> *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Co.,* 289 U.S. 67—

to support their contention.

But these cases do not involve and nowhere have the petitioners cited any cases involving District Court approval of a compromise settlement of litigation.

The reasons given by the Circuit Court of Appeals in its opinion adequately justify its holding that the District Court had complied with Rule 52 (a). As the Circuit Court of Appeals said:

> "the [district] court did find such facts as the nature of the case permitted. What was before the court? It was not the decision upon the facts or law involved in the two lawsuits brought by the Trustee, Mr. Brickley. It was the determination of whether or not in view of all the issues involved in those cases the settle-

ment was for the best interests of the estate being administered under its direction. The court in its decree of December 26, 1945 found, inter alia, 'That the court hereby determines that the compromise provided for . . . is for the best interests of the estate of said System [Hydro] that the consideration payable thereunder to said System is fair, reasonable, and adequate and that adequate notice and opportunity to be heard has been given to all persons interested . . .' These are findings of fact. They are ultimate facts, truly, and represent a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate. We do not see just what more could be asked for. Certainly the court was not required to put its guess as to the probable success of each claim and defense into a formally stated conclusion." (Circuit Court's Opinion, R. pp. 1735, 1736.)

II. Even if Rule 52 (a) were Applicable and Not Complied with by the District Court, the Circuit Court of Appeals Committed No Error in Failing to Remand the Case to the District Court for Further Findings of Fact and Conclusions of Law.

The petitioners, both in their brief and in oral argument before the Circuit Court of Appeals, specifically requested the court, instead of remanding the case to the District Court for findings and rulings, to decide itself the merits of the compromise settlement. The petitioners stated that in the best interests of the estate there was particular urgency that there be a final decision by the Circuit Court of Appeals on the settlement before December 31, 1946. The opinion of the Circuit Court discloses that it examined the

record for itself and made its own findings of fact and conclusions of law for the purpose of passing upon the merits of the proposed settlement. The opinion discloses that the Circuit Court of Appeals took into consideration all the factors that a court passing on the question *de novo* would be entitled to consider and independently reached its own conclusion. It specifically found that—

a. The difficulties involved in the jurisdictional point were very strong factors to be considered in the practicability of the terms of the settlement (R. p. 1731).

b. The uncertainties involved in the question of whether the actions were barred were clearly sufficient to be a relevant and important element in determining the advisability of settlement (R. p. 1732).

c. The question of whether liability could be imposed for the New England Power Association stock transaction is doubtful and that doubtfulness is a proper element to take into consideration concerning the desirability of a proposed settlement (R. p. 1734).

d. The trustee, in making his report to the court recommending the institution of this litigation, had no way of knowing what countervailing facts could be brought out by the defendants when their side of the case was presented (R. p. 1734).

e. There is the problem of possible ratification of the transactions complained of (R. p. 1734).

f. There are difficulties of great magnitude in connection with the valuations of the properties acquired by Hydro from the Paper Company (R. p. 1734).

g. The opinions rendered by Ropes, Gray, Best, Coolidge & Rugg and Robert G. Dodge, Esquire, to the effect that the establishment of liability was improbable, may properly be considered as one of the elements on a very practical matter of the settlement of a disputed claim (R. p. 1725).

h. The overwhelming majority of the security holders in this enterprise either approved of, or at least did not disapprove of, the settlement (R. p. 1726).

i. Vigorous opposition to the settlement comes from the holders of "A" stock and that opposition comes from a minority of about 19 percent of the total number of "A" shares (R. p. 1726).

j. To the extent the "A" stockholders can embark the corporate enterprise on long and expensive litigation, they will have a run for other people's money, the result of which, if rosy hopes are realized, will be a profit to them, but the risk will be on the senior securities. This element is one of the items which may be properly considered (R. p. 1727).

k. The affirmative recommendation of the Securities and Exchange Commission, which has spent a very great deal of time in investigating the affairs of Hydro as part of its public function, is an element to be considered in assessing the wisdom of the settlement (R. p. 1727).

l. The questions involved in the litigation are hard and complicated, both in facts to be proved and in law to be applied (R. pp. 1734, 1735).

m. The settlement acquires for the estate a great deal of money (R. p. 1735).

It is submitted that in a proceeding of this sort no more could be asked for, and that the petitioners in fact obtained exactly what they sought.

III. The Circuit Court of Appeals did Not Commit Error in Affirming the District Court Settlement.

In questions 5 and 7 presented by the petitioners to this court the petitioners claim that the Circuit Court of Appeals erred in failing to analyze correctly and adequately the merits of Hydro's causes of action against Paper Com-

pany and the insufficiency of Paper Company's defenses thereto, and in failing to reject the settlement as unfair and inadequate.

But the Circuit Court of Appeals in its opinion, after considering and analyzing the record, the briefs and oral arguments of both sides, specifically found that whether Hydro could overcome Paper Company's defenses of lack of jurisdiction, the statute of limitation and laches were difficult legal questions with the result uncertain, and the Circuit Court adverted to the possibility that the defense of ratification might be valid. Furthermore, the Circuit Court found that it was doubtful whether any cause of action existed for the New England Power stock transaction, which was the largest item in the list of complaints which Hydro made against Paper Company.

In addition, the Circuit Court in its discussion of laches and the statute of limitations mentioned the issue of fact between Hydro and Paper Company as to whether Hydro could prove actual domination over it by Paper Company and thus establish liability for the water powers transaction. In this connection the petitioners have erroneously assumed at pages 36 to 38 of their brief that Paper Company owed a fiduciary duty to Hydro merely because Paper Company owned Hydro stock and because some of the directors of Hydro were also directors of, or indirectly interested in, Paper Company. Petitioners claim that these Hydro directors were disqualified from voting to purchase the New England Power stock and water powers from Paper Company. But it is clear that the applicable Massachusetts law, especially where there are exculpatory clauses as in the case at bar, is otherwise.

Mairs v. *Madden*, 307 Mass. 378, 380.
Bell v. *Fred T. Ley & Co., Inc.*, 278 Mass. 60.
Spiegel v. *Beacon Participations, Inc.*, 297 Mass. 398.

Thus under Massachusetts law it was necessary for Hydro to prove domination in fact by the Paper Company over Hydro to establish liability for the water powers transaction. In its opinion, the Circuit Court of Appeals recognized the difficulties involved in sustaining such a burden at a trial on the facts.

The serious doubt that Hydro could establish any liability against Paper Company and in addition overcome substantial affirmative defenses adequately justified approval of the compromise settlement. But the petitioners have attempted in their brief to create the impression that Hydro's potential recovery, assuming liability were established, would exceed $131,000,000.

Perhaps at this point it is well to point out that the petitioners in contending that the recovery in this litigation could amount to $131,000,000 are assuming that every issue of fact and conclusion of law, of the many legal and factual issues involved, would be resolved in their favor. As the Circuit Court pointed out, however, "a defendant only has to make good on one defense to win a lawsuit" (R. p. 1725).

Petitioners claim that the measure of damages on the New England Power stock transaction was the price paid by Hydro minus salvage value, and they rely upon *Spiegel* v. *Beacon Participations, Inc., supra.* But the Spiegel case was a suit against directors and is to be distinguished from *Old Dominion Copper &c. Co.* v. *Bigelow,* 203 Mass. 159, where liability was imposed upon promoters who forced a sale upon the plaintiff of property acquired by the promoters before the plaintiff corporation was formed. The Bigelow case holds that the measure of damages is the difference between the price paid by the complaining corporation and market value, where market value can be ascertained. But it appears that Hydro paid $6,717,000 less than then current market quotations for the bulk of New

England Power stock purchased in March and April, 1929 (R. pp. 497, 914 *et seq.*).

"To the extent that a claim based on this New England transaction is subject to defense or a scaling down of damages claim, the amount involved in the settlement comes closer to being the actual amount which could have been recovered in favorable litigation." (Circuit Court Opinion, R. p. 1733.)

Petitioners further claim that the measure of damages in the water powers deal is the difference between the price paid by Hydro and the depreciated cost to Paper Company. However, since the water powers were all acquired by Paper Company before Hydro was formed, the measure of damages under the Bigelow case would be the difference between the cost paid by Hydro and fair market value. But, as stated by the Circuit Court, there were difficulties of great magnitude in determining what the fair market value of the water powers was in 1932 when they were sold to Hydro, and these difficulties undermine the petitioners' rosy hopes for a twenty-four million dollar recovery on the water powers deal (R. p. 1734).

It is obvious from the opinion of the Circuit Court of Appeals that it analyzed and evaluated the merits of Hydro's claims and of Paper Company's defenses. In affirming the decision of the District Court, the Circuit Court of Appeals has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

The petitioners assign as a reason for their petition being granted that the Circuit Court of Appeals restricted "the Class A rights to have their legitimate claims fully explored and litigated" (Petition, p. 15), and thus took a position "exactly opposite" to that of the Fourth Circuit Court of Appeals in *In re Central States Electric Corp.*,

143 F. (2d) 684. There is no conflict between that case and the case at bar. In the Central States Electric case the question was whether the District Court should have ordered an investigation of possible causes of action in behalf of the corporation at the request of junior security holders. In the case at bar, an investigation was made by the order of the District Court by special counsel appointed by the court for that purpose, and he reported, not that there were valid causes of action as claimed by the petitioners, but that in his opinion there was sufficient evidence to warrant the institution of suit (R. pp. 265, 294). Suit was in fact instituted, the settlement of which is the very subject-matter of this proceeding. The Circuit Court has not decided that this litigation should be settled solely because continued prosecution thereof might injure senior securities. The Circuit Court held that the risk involved in continued prosecution of this suit would be on the holders of senior securities and opposition to the settlement came from the holders of only about 19 per cent of the class A stock and that this was but one of the many elements which could properly be considered in the approval of the settlement (Circuit Court Opinion, R. p. 1727). If the contention of the petitioners were applied to a case like the one at bar, no compromise settlement of litigation could be approved whenever any junior security holder objected.

CONCLUSION.

Wherefore it is respectfully submitted that writ of certiorari in this case should not be granted.

BARTHOLOMEW A. BRICKLEY,
SAMUEL HOAR,
EDWARD R. LANGENBACH,
FRANK B. WALLIS.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 23 1947
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 825.

OSMOND Y. LADD AND PAUL H. TODD,
Petitioners,

v.

BARTHOLOMEW A. BRICKLEY, TRUSTEE, SECURITIES & EXCHANGE COMMISSION AND OTHERS.

BRIEF FOR INTERNATIONAL PAPER COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN L. HALL
JOHN W. DAVIS
Attorneys for International Paper Company

New York, January 22, 1947

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
(a) Waiver of present claim by petitioners in the District Court	4
(b) Waiver of present claim by petitioners in the Court of Appeals	4
ARGUMENT	6
1. This record presents no more than the exercise of judgment and discretion by the courts below in approving a settlement of litigation, which is not a case appropriate for review by this Court under Rule 38	6
2. Independently of the foregoing argument, it is clear upon this record that no question of non-compliance with Rule 52(a) is presented	10
(a) By its terms the rule does not apply	10
(b) Applicability of Rule 66	11
(c) Even if applicable Rule 52(a) was complied with	11
(d) Waiver by petitioners	13
CONCLUSION	14

TABLE OF CASES

	PAGE
Consolidated Rock Co. v. *DuBois*, 312 US 510	8
Deputy v. *duPont*, 308 US 488	7
Ecker v. *Western Pacific Railroad Corp.*, 318 US 448	8
Goodacre v. *Panagopoulos*, 110 F (2d) 716	13
Hurwitz v. *Hurwitz*, 136 F (2d) 796	13
In re Central States Electric Corp., 143 F (2d) 684	9
Kelley v. *Everglades Drainage District*, 319 US 415	7, 11, 12
Lindsey v. *Leavy*, 149 F (2d) 899, cert. den. 326 US 783	11
Magnum Import Co. v. *Coty*, 262 US 159	7
Public Service Commission v. *Wisconsin Telephone Co.*, 289 US 67	11
Rossiter v. *Vogel*, 148 F (2d) 292	13
Schad v. *Twentieth Century-Fox Film Corp.*, 136 F (2d) 991	11
Thomas v. *Peyser*, 118 F (2d) 369	11

OTHER AUTHORITIES

Bankruptcy Act	
§77	8
§83(e)	12
Federal Rules of Civil Procedure	
Rule 52(a)	1, 5, 6, 9, 10, 11, 13
Rule 66	2, 8, 11
Judicial Code §240(a), 28 USC §347(a)	1
Public Utility Holding Company Act of 1935, 15 USC	
§79	3, 8
§11(b)	2
§11(d)	2, 8, 9
Rules of the Supreme Court	
Rule 38	6

Supreme Court of the United States

OCTOBER TERM, 1946.

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,
v.
BARTHOLOMEW A. BRICKLEY, Trustee, SECURITIES & EXCHANGE COMMISSION and Others.

No. 825.

BRIEF FOR INTERNATIONAL PAPER COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals, not yet reported, appears at record pp. 1721-36.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 14, 1946 (R. 1736). The petition for writ of certiorari was filed December 28, 1946. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 USC § 347(a).

STATUTES INVOLVED

Rule 52 of the Federal Rules of Civil Procedure provides in part:

> "(a) In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . ."

Rule 66 provides:

> "The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."

Section 11(d) of the Public Utility Holding Company Act of 1935, 15 USC § 79, provides that in any proceeding to enforce compliance with any order issued under § 11(b) thereof,

> "the court as a court of equity may, . . . take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, . . . to hold or administer under the direction of the court the assets so possessed. In any proceeding . . . the trustee with the approval of the court shall have power to dispose of any or all of such assets. . . ."

STATEMENT OF THE CASE

With respect to the merits, the statement of underlying facts in the petition and in the petitioners' brief is full of inaccuracies; but these are here disregarded as immaterial to the only question now presented, viz. whether the writ should issue.

The District Court for Massachusetts was administering the estate of International Hydro-Electric System under the Public Utility Holding Company Act of 1935 (R. 260-2). By direction of the Court Brickley as trustee of the estate (R. 306-7) had commenced suit in the District Court and in the State Court against International Paper Company claiming a rescission or in the alternative $96,000,000 damages in respect of transactions between the System and the Paper Company had in 1929 and 1932 (R. 485-515, 516-42). Before trial the parties agreed on a settlement whereby International Paper Company was to pay $10,000,000 cash and purchase $3,000,000 principal amount of a proposed bond issue (R. 311-41).

On the petition of the trustee for authority to consummate the settlement, upon notice to all interested parties (R. 307-41) and after hearing (R. 342-7), the District Judge approved the settlement by decree in which he determined that the compromise was for the best interests of the estate and that the consideration payable thereunder to the System was fair, reasonable and adequate (R. 348-53). The decree contains specific directions with respect to carrying out the settlement. It contains neither findings of fact nor conclusions of law denominated as such.

The present petitioners appealed, contending that the settlement was inadequate and that the trustee should not have settled for less than $23,000,000 (R. 807). The opinion of the Circuit Court of Appeals approving the action of the District Court (R. 1721) devotes more than 10 pages to a consideration of the arguments for and against the settlement (R. 1724-35).

(a) Waiver of present claim by petitioners in the District Court

The primary ground claimed by petitioners for the granting of the writ is that there should have been findings and conclusions below as in an action "tried upon the facts without a jury." Yet not only is it evident in the nature of the case that the approval of the settlement in the District Court was not a trial on the facts: the petitioners accepted this proposition in the District Court. The Judge said (R. 449):

> "There is a distinction between considering the merits of this matter and trying the case on the merits. I was referring to trying the case on the merits, which of course we are not doing at the present time."

Counsel for objecting stockholders to whom the Court was addressing these remarks agreed with this statement, and the present petitioners stood mute. Counsel for the present petitioners had previously said to the Court (R. 425):

> "So your function at this time is to get a general outline of the litigation and the possibilities of recovery and make some independent judgment of your own upon the possibilities of recovery and the defenses."

No suggestion was made in the District Court by any party that the proceeding there was a trial upon the facts, or that findings and conclusions be made.

(b) Waiver of present claim by petitioners in the Court of Appeals

In the Circuit Court of Appeals the petitioners claimed that there should have been detailed findings under Rule

52(a), but further urged that the Circuit Court of Appeals "should examine the record at large and make its own determination as to the propriety of the compromise and adequacy of the settlement consideration" (R. 1713), and the settlement "should be rejected by the appellate court upon its own original view and examination of the record" (R. 1714-5). Nowhere in petitioners' Statement of Points was it suggested that the case should be sent back for findings.

In their brief before the Circuit Court of Appeals, as in oral argument there, the petitioners emphasized the position so taken. After arguing the applicability of Rule 52(a), the petitioners said:

> "In this situation appellant is entitled at least to have a reversal and remand of the case for sufficient findings to enable an intelligent review." (br. p. 40)
>
> *"But instead of remanding the case for findings below, the appellate court has the power to decide and should decide for itself, the original merits of the case, where any special circumstances call for that disposition."* (br. p. 41)
>
> "In our present case there is particular urgency why the final order rejecting this settlement should be entered before December 31, 1946." (br. p. 43)
>
> "In one class of cases it sometimes happens that the trial court is in better position to pass on the acceptability of compromise offers, where controlling considerations are matters of discretion." (br. p. 46)
>
> "But in our own case the lower court was not in better position as compared with the position of this reviewing court. . . this Appellate Court will have well considered briefs of counsel and opportunity

> for full and deliberate study of the record as occasion may require—and will also have every fact before it which was available to the trial court." (br. p. 47)

This was a definite submission by petitioners to the appellate court of their entire claim with respect to the adequacy of the settlement, embracing a disclaimer of any contention that the lack of findings and conclusions rendered impossible a proper review of the settlement by the Circuit Court of Appeals. That Court accepted the invitation of the petitioners. It reviewed at some length (R. 1724-35) the arguments of all parties as to the adequacy and propriety of the settlement. Its opinion is a full, though informal, statement of findings and conclusions.

ARGUMENT

1. ***This record presents no more than the exercise of judgment and discretion by the courts below in approving a settlement of litigation, which is not a case appropriate for review by this Court under Rule 38.***

While petitioners try to make it appear (petition p. 6) that important questions of Federal law and a probable conflict between Circuits are involved, the discussion in their brief (pp. 36-48) affirmatively shows that what they want this Court to do after assuming jurisdiction, is what they asked the Circuit Court of Appeals to do, viz. to determine the adequacy of the settlement approved by the District Court. Only in order to obtain a review of the case at large do they contend that in determining the sufficiency of the settlement the courts below erred in their procedure through asserted failure to follow Rule 52(a).

This Court has pointed out that the jurisdiction to review by certiorari was given for two purposes: first, to secure uniformity of decision among the Circuits; and second "to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort". *Magnum Import Co.* v. *Coty*, 262 US 159, 163. This Court there continued:

> "The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

See also *Deputy* v. *duPont*, 308 US 488, 500.

The evaluation by the courts below of the money worth of Brickley's pending litigation involved only the application of judgment and discretion to a special state of facts, not the solution of any question of Federal law or of any conflict among the Circuits. There is no suggestion by petitioners that the particular state of facts presented below, on which discretion was exercised, will ever be presented again. If this Court were to grant certiorari, the substantive question which it would be required to consider would remain the same as that already determined by the Circuit Court of Appeals, viz. whether the District Judge abused his discretion in approving the Brickley settlement. Petitioners would thereby obtain another hearing on the questions already twice decided below. That is just what this Court has so often said will not be permitted.

On this crucial defect in the petitioners' papers, i.e. the absence of any proper question for certiorari, the practice point so much labored in those papers is immaterial. The bankruptcy cases, such as *Kelley* v. *Everglades Drainage District*, 319 US 415, are not helpful to petitioners, be-

cause those do involve substantive questions under the bankruptcy power which this Court is frequently obliged to review. The requirement in those cases of findings and conclusions is explicitly imposed by statute. But even in those cases only such findings are required as are germane to the questions required to be decided by this Court. For example this Court pointed out in *Ecker* v. *Western Pacific Railroad Corp.*, 318 US 448 (a reorganization under Bankruptcy Act §77), that a separate dollar valuation of the property or claims involved was not necessary in the absence of creditors of subsidiary companies who claimed against the parent company (pp. 482-3), and thus distinguished *Consolidated Rock Co.* v. *DuBois,* 312 US 510, where such dollar valuations were deemed requisite in a different state of facts. The instant case presents an extension of the same line of reasoning. In this case, in the absence of any dispute on the facts, the application of judicial discretion to the question of the reasonableness and fairness of the settlement offer did not require detailed findings. This case does not in any aspect present a composition of claims, an allocation of securities, or a determination of priorities as in bankruptcy.

The "important question of federal law" asserted by petitioners to arise here from the supposed fact that a sweeping construction of the Public Utility Holding Company Act of 1935 is involved (petition pp. 6-8), does not arise at all. The Court of Appeals held merely that a trustee appointed under §11(d) of the Act is an officer similar to a receiver within the meaning of Rule 66 (R. 1736). Beyond that nothing whatever turned upon any provision of the Act. Neither the fact that the equitable jurisdiction of the Court derived from the Act rather than from

its general equity jurisdiction nor that it was under §11(d) that the trustee obtained his title to prosecute the cause of action which he asked authority to settle, played any part in the decision. The holding that Rule 52(a) did not apply was based wholly upon the nature of the proceeding, not on its origin.

Similarly insubstantial is the effort by petitioners to create a conflict between the First and Fourth Circuits with the citation of *In re Central States Electric Corp.*, 143 F (2d) 684 (petition pp. 13-6). In that case the Fourth Circuit stated that the District Judge had erroneously concluded that he had no discretion to order a further investigation of the advisability of bringing litigation on behalf of the estate at the instance of junior security-holders against the wishes of senior security-holders. The Fourth Circuit could properly hold that a claim seriously asserted should not be abandoned without investigation merely because that would entail expense. But no such question arises here. In the present case the relations between the Paper Companies and System out of which the asserted causes of action are said to have arisen have been fully investigated; *first* in 1931 by the Federal Trade Commission (Exh. 1, not printed, see R. 356, 1707), *second* in 1943 in the exhaustive opinion by Ropes, Gray, Boyden & Perkins (Exh. 8, R. 568-770), *third* also in 1943 in the similarly careful opinion of Robert G. Dodge (Exh. 9, R. 770-806), *fourth* in 1944 by Mr. Brickley as special counsel (R. 263-306), and *fifth* in 1944 by the parallel investigation by the Securities and Exchange Commission (see R. 378, 362). It was in the light of these five investigations that the litigation was commenced by Mr. Brickley as trustee (R. 363-4). It was this litigation which the District Judge later deter-

mined should be settled upon the basis recommended by the trustee; and it is only in connection with its own approval of the settlement that the Court of Appeals held (R. 1727) that the natural desire of junior security-holders like the petitioners to litigate at the expense of other security-holders was an item which could properly enter into the discretionary ruling which was made. The holding of the First Circuit in approving the exercise of discretion in the confirmation of the settlement, conflicts in no way with the holding of the Fourth Circuit that the District Court had power to make an investigation; and petitioners' attempt to build a parallel between the two cases is grotesque.

2. *Independently of the foregoing argument, it is clear upon this record that no question of non-compliance with Rule 52(a) is presented.*

(a) By its terms the rule does not apply

The provisions of Rule 52(a) are limited to "actions tried upon the facts without a jury." But the proceedings below did not involve a trial, as the District Judge pointed out (R. 249). While pleadings were before the court, documentary material was received without regard for the rules of evidence (cf. R. 1734, footnote); no witness to fact was called; no objection was interposed by any party to the reception of material tendered; and no presentation whatever was had of International Paper Company's side of the case. The whole proceeding, in other words, was directed merely to the appraisal of the probable value of a claim in litigation, having regard to the general nature of the testimony which could possibly be elicited on either side and to all the hazards of litigation.

Hence Rule 52(a) did not apply. In the absence of triable issues of fact, as on summary judgment, findings

and conclusions are not required. *Lindsey* v. *Leavy* (CCA 9, 1945), 149 F (2d) 899, 902, cert. den. 326 US 783; cf. *Thomas* v. *Peyser* (Ct. App. D. C. 1941), 118 F (2d) 369, 374; *Schad* v. *Twentieth Century-Fox Film Corp.* (CCA 3, 1943), 136 F (2d) 991, 993.

Quite different are the cases relied upon by petitioners where issues were tendered in true adversary litigation (as in *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 US 67) or where findings are indispensable to a review of a complete plan of reorganization and are consequently specifically required by statute (as in *Kelley* v. *Everglades Drainage District*, 319 US 415). In both those types of situation the District Court conducts a full trial upon the facts to the extent permitted by the nature of the jurisdiction exercised.

(b) Applicability of Rule 66

The Court of Appeals correctly held that, since the District Court was not trying issues on the facts but was administering an estate in equity, the trustee was in a position similar to that of a receiver (R. 1736). Hence the applicable provision of the Rules is Rule 66. In the practice of administering estates by receivers "and by other similar officers appointed by the court", it has never heretofore been suggested, so far as we can find, that the confirmation of a receiver's sale required detailed findings and conclusions; and petitioners cite no authority establishing any such requirement.

(c) Even if applicable Rule 52(a) was complied with

Rule 52(a) requires only what is reasonably possible in the circumstances of a given case. On the question of

valuation and judgment which is involved in the compromise of litigation detailed findings are of little or no use. They could amount to no more than a rehearsal of facts not in dispute with an appraisal of the plaintiff's chances on enumerated aspects of the litigation. Such an appraisal, if expressed in percentages, would be bound to be misleading. Only an over-all judgment representing plaintiff's chance on the whole case would be feasible in any event. That finding the District Court did make in its statements in the decree. With reference to those statements the Circuit Court of Appeals said (R. 1735-6):

> "These are findings of fact. They are ultimate facts, truly, and represent a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate. We do not see just what more could be asked for. Certainly the court was not required to put its guess as to the probable success of each claim and defense into a formally stated conclusion."

Thus the Circuit Court of Appeals felt it had before it all of the findings which it reasonably could expect.

In this there is nothing in conflict with *Kelley* v. *Everglades Drainage District,* 319 US 415. In that case the governing statute, Bankruptcy Act § 83(e), contained specific requirement of findings and conclusions on six specific matters (four as to fact and two as to law) as a condition to the relief provided by the section. Until those facts had been found it was impossible for the court to say whether the requirements of the Act had been met. Here on the other hand the Circuit Court of Appeals was in a position intelligently to determine the ultimate question

which was whether the District Judge had abused his discretion, and no extension of findings of fact under Rule 52(a) could have put it in better position.

(d) Waiver by petitioners

We have pointed out at pages 4-6 above petitioners' waiver of their present position, both in the District Court and in the Circuit Court of Appeals. It is elementary that findings are not a jurisdictional requirement and that the right thereto may be waived. *Rossiter* v. *Vogel*, (CCA 2 1945) 148 F (2d) 292, 293; cf. *Hurwitz* v. *Hurwitz* (Ct. App. D. C. 1943), 136 F (2d) 796, 799; *Goodacre* v. *Panagopoulos* (Ct. App. D. C. 1940), 110 F (2d) 716, 718. Hence, even if Rule 52(a) had been departed from in this case, the petitioners cannot complain, because they specifically asked the Circuit Court of Appeals to consider the case upon the record without remand. In so far as any failure to comply with Rule 52(a) could give the petitioners a right to remand, they waived that right. Their quarrel with the Circuit Court of Appeals is not that it failed to remand the case but that it concluded that there was no abuse of discretion in approving the settlement. They asked the Court to come to its own conclusion, and thus agreed that on the record before it the Circuit Court of Appeals could reach an intelligent conclusion on the fairness of the settlement and its practical wisdom. The petitioners asked the Court to find it unfair on that record. Implicit in this request was recognition that the Court could properly conclude that the District Judge did not abuse his discretion when he found it fair upon the same record.

CONCLUSION

NO IMPORTANT QUESTION OF FEDERAL LAW AND NO INCONSISTENCY OF DECISION EITHER WITH THIS COURT OR WITH OTHER CIRCUITS IS PRESENTED ON THIS RECORD SUCH AS WOULD WARRANT THE GRANTING OF A WRIT OF CERTIORARI.

Respectfully submitted,

JOHN L. HALL
JOHN W. DAVIS
Attorneys for International Paper Company

New York, January 22, 1947

FILE COPY

FILED
JAN 24 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD and PAUL H. TODD,

Petitioners,

—*vs.*—

BARTHOLOMEW A. BRICKLEY, Trustee of International Hydro Electric System, SECURITIES & EXCHANGE COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR ETHEL KRESBERG, SAMUEL KRESBERG AND MILDRED KRESBERG, HOLDERS OF INDENTURES OF INTERNATIONAL HYDRO ELECTRIC SYSTEM, INTERVENORS-RESPONDENTS.

JOSEPH NEMEROV,
Attorney for Intervenors-Respondents,
Office & P. O. Address,
135 Broadway,
Borough of Manhattan,
City of New York.

SUBJECT INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Principal Questions Involved	2
Argument	2
I. Findings of fact and conclusions of law by the Lower Court were unnecessary. Federal Rule 52(a) does not apply to the instant proceeding	2
II. The complex legal and factual questions in the transactions complained of and the uncertainty of recovery justified the Court below in approving the settlement	4
III. The unanimous judgment of the trustee, his counsel and other independent counsel, coupled with the recommendations of the Securities & Exchange Commission, should weigh heavily in the consideration as to whether the District Court abused its discretion	8
IV. The action of the District Court is presumptively right, and should not be set aside unless clearly shown to have been wrong. In approving the settlement, the Court below was bound to take into consideration not only the prospects of recovery, but also the delay, which naturally results from protracted litigation, and the great expense incidental thereto	15
V. Petitioners have failed to adduce sufficient proof of probative value to support their objections to the recommendation of the trustee and the Securities & Exchange Commission	17
Conclusion	18

CASE AND RULE INDEX

Table of Cases.

	PAGE
Arn v. Dunnette, et al, 93 Fed. 2nd, 634	6
Ball v. Breed, Elliott & Harrison, 294 Fed. 227, 231, 232	5
Everett v. Phillips, 288 N. Y., 227, 236	7
Kelley v. Everglades District, 319 U. S. 415, 87 Law Ed. 1485	3
McCandless v. Furlaud, 296 U. S. 140, 80 Law Ed. 121	6
Old Dominion Company v. Bigelow, 203 Mass. 159	6
Old Dominion Company v. Lewisohn, 210 U. S. 206, 52 Law Ed. 1025, 1029	5, 6
In re Prudence Co., Inc., 98 Fed. 2nd, 559, 560	15
In re Riggo Bros. Company, Inc., 42 Fed. 2nd, 174, 176, 177	15
Stein v. McGrath, 306 U. S. 636	15

Rules

Rule 52(a), Rules of Civil Procedure	2, 3
General Order in Bankruptcy 37	
Section 240(a) of the Judicial Code, as amended, Section 347(a) of Title 28 of the U. S. Code	2
Ehrich on Promoters, Section 120	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD and PAUL H. TODD,

Petitioners,

—*vs.*—

BARTHOLOMEW A. BRICKLEY, Trustee of International Hydro Electric System, SECURITIES & EXCHANGE COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR ETHEL KRESBERG, SAMUEL KRESBERG AND MILDRED KRESBERG, HOLDERS OF INDENTURES OF INTERNATIONAL HYDRO ELECTRIC SYSTEM, INTERVENORS-RESPONDENTS.

Opinions Below.

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals, filed November 14th, 1946. is not yet reported.

Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended (Section 347(a) of Title 28 of the U. S. Code).

Principal Questions Involved.

The principal questions involved are two. 1—Were formal findings of fact and conclusions of law, other than those contained in the decree affirming the compromise, required to be made by the District Court? 2—Was there an abuse of discretion in approving of the compromise?

Argument.

POINT I.

Findings of fact and conclusions of law by the lower Court were unnecessary. Federal Rule 52(a) does not apply to the instant proceeding.

Federal Rule 52(a) reads as follows:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

The rule is by its express language limited to actions in which there are issues of fact triable by the Court without a jury and to applications for interlocutory injunctions. It relates to suits in which evidence is presented by the opposing parties and the court is required to pass upon factual issues before it can render its decision.

An examination of the cases cited by the appellants in Point I of their brief (pp. 38 to 41 incl.) discloses that all of them deal either with judgments rendered by the Court after trial of issues of fact and law, or with applications for injunctions; with the one exception of *Kelley* v. *Everglades District,* 87 Law Edition 1485 (p. 41 of app. br.), which dealt with a composition in bankruptcy; the Court there in its opinion expressly adverted to the fact that Rule 52(a) was made applicable to the proceeding in bankruptcy there involved by General Order in Bankruptcy #37.

The reason for the rule would seem perfectly clear where issues of fact are presented to the court and proof is submitted. The facts upon which the court's decision is based must be specially stated in appropriate findings, as must also be the court's conclusions of law predicated upon those facts. In those cases no question of the exercise of discretion on the part of the court is involved.

In the instant case the court was not called upon to try or determine any factual issue nor to pass judgment on either the claims of the appellants or the defenses of International Paper Company. All the court was required to determine was whether, in its opinion, there was sufficient doubt as to the likelihood of success in the actions and, if recovery was not certain, whether the amount of settlement proposed and recommended by the plaintiff-trustee and his counsel and the S. E. C. was or was not a reasonable one under all of the circumstances.

Where the court is not under a duty to resolve facts presented to it in favor of one or the other of the litigants, but the matter merely calls for the exercise of the court's discretion, Rule 52(a) does not apply.

POINT II.

The complex legal and factual questions involved in the transactions complained of and the uncertainty of recovery justified the Court below in approving the settlement.

We shall not enter upon a detailed recital of the relations between the two Paper Companies and Hydro or the transactions complained of, but shall briefly refer to the two transactions which constitute the bulk of the claims upon which the actions against International Paper Company are predicated. They took place in 1929 and 1932 respectively.

Re The 1929 Transaction.

This first transaction embraced the organization of International Hydro Electric System as a Massachusetts trust by International Power and Paper Company and International Paper Company (R. 273). Prior to such organization, and as part of the plan pursuant to which Hydro was organized, International Power and Paper and International Paper had arranged for the transfer to Hydro of a block of stock in New England Power Association for a consideration to be paid by Hydro of $22,800,494., plus an option for additional stock of New England Power Association for which Hydro was to pay about $35,000,000 (R. 264, 265). The only stock issued by Hydro upon its organization was 500,000 shares of its Class B stock for which it received from International Paper and Power $10,000,000. in cash, 475,000 shares of its Class A stock which were issued to International Paper and Power and paid for by it at the rate of $41. per share, and 2,000,000 shares of its common stock which were issued to International Paper as part of the consideration for the foregoing transfers (R. 264, 265).

It will be seen, therefore, that at the time of the organization of International Hydro Electric System no stock was issued to any outsider and that the only parties interested were International Paper and Power Company and International Paper Company, as promoters, on the one side, and the International Hydro Electric System on the other.

Viewing International Paper and Power and International Paper as promoters in the foregoing transactions, we find that there is by no means a certainty that a recovery will be obtained.

We have on the one hand the rule laid down by the U. S. Supreme Court in *Old Dominion Company* v. *Lewisohn,* 210 U. S. 206, 52 Law Ed. 1025, to the effect that, where the promoters are both the sellers and the buyers, and all of the stock of the corporation is issued to the promoters and none sold to the public, interests that entered into the situation subsequent to the organization, can not complain of any transaction that occurred as part of the promotion of the enterprise. The Court in its decision states:

> "At the time of the sale to the plaintiff, then, there was no wrong done to anyone. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land" (Law Ed. p. 1029).

In *Ball* v. *Breed, Elliot and Harrison,* 294 Fed. 227, it was held that no cause of action accrues to the corporation because of the subsequent sale by the promoters of their stock to the public.

The court quoting from *Ehrich on Promoters,* Section 120 states (p. 231):

> "It is now established by an almost unbroken line of decisions that, if the promoters themselves take

the entire share capital of the corporation and then sell the shares to outside parties, there is no fraud upon the corporation, and no basis of complaint by it, no matter what profits the promoters may derive from the transaction. * * *"

(p. 232) "If there is any fraud in a subsequent sale of the shares, the cause of action arising therefrom is personal to the purchasers. The matter is one between these purchasers and their vendor, and no cause of action results to the corporation therefrom."

See also:

Arn v. *Dunnett, et al.*, 93 Fed. 2nd, 634.

We are not unmindful that there are authorities supporting the claims advanced in the action by the Trustee and in the *Ladd* and *Todd* actions against International Paper. We find that the Supreme Court of Massachusetts, in *Old Dominion Company* v. *Bigelow*, 203 Mass. 159, has held to the contrary, where the promoters at the time of the inception of the enterprise had in mind a subsequent sale of stock to the public. Likewise in *McCandless* v. *Furlaud*, 296 U. S. 140, 80 Law Ed. 121, an action by a Receiver of the corporation was upheld. That case, however, seems to be distinguishable, since the court there apparently based its decision to a large extent upon the fact that the corporation was rendered insolvent by the fraudulent acts of its promoters. No such situation is present in the instant case.

We have referred to the Massachusetts case of *Old Dominion* v. *Bigelow, supra,* as going farther than *Old Dominion* v. *Lewisohn, supra,* in holding promoters liable. In the former about seven years had elapsed since the transaction complained of had occurred. It will be noted that while a recovery was allowed, rescission was denied. In the instant

case the time that has elapsed since the transactions complained of is 17 years with respect to the 1929 transaction and 14 years with respect to the 1932 transaction. If the complainants here were to be denied rescission and relegated to their claim for damages, their recovery may be limited to the difference between the market value of the properties acquired by Hydro and the price paid therefor, which may not even approach the amount of $10,000,000 offered here in settlement.

It is obvious that there may be a legitimate doubt in the mind of anyone exercising an unbiased judgment as to which line of cases would control.

Re The 1932 Transaction.

As regards that transaction, in which International Paper and its subsidiaries transferred to Hydro and its subsidiaries certain water powers for a price of upwards of $31,000,000, we find that the negotiations were protracted, covering the period of a year or more, during which time the number of directors of Hydro were successfully increased from 7 to 9 (R. 283), from 9 to 13 (R. 283), and again from 13 to 20 (R. 285). The price originally placed upon the properties by International Paper was in excess of $37,000,000 (R. 286). Due to objections on the part of some of Hydro's directors, the price was finally reduced and agreed upon at $31,797, 610.39 (R. 289). It will undoubtedly be most difficult to prove that the Board as finally constituted was under the domination of International Paper or that the transaction was not at arms' length or that the profit accruing to International Paper was unconscionable.

The fact that some of or even a majority of directors of Hydro may have been elected at the instance of International Paper does not in and of itself establish that their judgment in approving the transaction was biased.

Everett v. *Phillips*, 288 N. Y., 227, 236.

Fully 11 years had elapsed before the first of the suits on behalf of Hydro against International Paper were instituted. We are faced with the questions of ratification, lapse of time and laches, as well as the difficulty of establishing the right to rescission or to damages. It must be obvious that the certainty of recovery is by no means clear.

POINT III.

The unanimous judgment of the trustee, his counsel and other independent counsel, coupled with the recommendations of the Securities and Exchange Commission, should weigh heavily in the consideration as to whether the District Court abused its discretion.

Prior to the appointment of Mr. Brickley as special counsel, appellant Todd, who was then a director of Hydro, had demanded that Hydro take action against International Paper. Hydro then retained Messrs. Ropes, Gray, Boyden and Perkins, a firm of Massachusetts attorneys of high professional standing, to make investigation of the claims presented by Mr. Todd and to give their opinion as to the advisability of instituting suit. Their opinion will be found in the record on appeal (Vol. 2, Pet's. Exh. 8, pp. 568 to 769). In it, after an apparently thorough analysis of the history of the transactions and the law applicable thereto, they reached the conclusion, and so advised Hydro, that an action against International Paper could in all likelihood not succeed, and hence was not advisable. At about the same time an opinion was requested of Mr. Dodge of the firm of Palmer, Dodge, Wilkins and Davis, another well known firm of Massachusetts attorneys, and his opinion in which he reached a similar conclusion will be found in the record (Vol. 2, Exhs. 9, 9A and 9B, pp. 770 to 806).

Subsequently Mr. Brickley was appointed special counsel by the Court below to investigate the charges against In-

ternational Paper and to report to the Court thereon. He made a most exhaustive study of the situation, including not only the study of documentary evidence, but also the examination of witnesses. On the basis of such investigation he recommended to the Court that suit be brought. Thereafter he was appointed the Trustee for the purpose, among other things, of instituting such suit. Suit was thereafter instituted. Pending the action negotiations for a settlement were started. Mr. Brickley succeeded in having the settlement offer increased from an original amount of $500,000. to the sum of $10,000,000., plus a loan of $3,000,000 to one of Hydro's subsidiaries, which he and his counsel deemed an acceptable compromise of the claims in controversy (R. 387).

The Securities and Exchange Commission took the position on the hearings below that, while it was not purporting to give an opinion with respect to the merits of the claims or defenses, nevertheless it thought the setlement should be approved (R. 459 to 466).

Having due regard to the opinions of Messrs. Ropes, Gray, Boyden & Perkins, and Messrs. Palmer, Dodge, Wilkinson & Davis, as to the impossibility of recovery, and the opinions of Mr. Brickley, Mr. Hoar and Mr. Langenbach, and the recommendations of Securities & Exchange Commission as to the advisability of the settlement, it seems to be the better part of discretion to accept the settlement, rather than to run the risk of protracted litigation, as to the successful outcome of which counsel of standing have expressed strong doubt.

We must also bear in mind that Mr. Brickley in his capacity as Trustee for Hydro, and as an arm of the Court, and the Securities & Exchange Commission, a governmental agency, created for the protection of the investing public, are perhaps the only parties to this proceeding not actuated by any personal motive and free from partisan bias.

The careful and painstaking consideration given by Mr. Brickley to every phase of the problems affecting the trust estate and the justification for his final judgment on the matter in issue cannot perhaps be better evidenced than by letting the testimony given by him at the hearing on the proposed settlement speak for itself. We quote from it the following:

Page 369. In answer to questions as to why he considered the offer sufficient:

> A. Because I think there are very serious questions on the facts and very serious questions on the law, and that the payment of $10,000,000 at this time is such a sum as we should accept under all the circumstances.

At page 370:

> The Securities and Exchange Commission has been kept informed of every fact in connection with this matter since I have been appointed trustee.

At page 371:

> I considered every fact which came to my attention. from whatever source it came. I considered the law involved. I weighed the facts and the law against the offer which we had, and as a result of that weighing, I made the recommendation which now appears in this case.
>
> Q. Well, to what extent has your consideration of the law guided your opinion in recommending this settlement? A. I cannot give you the percentage, but I considered it very seriously.
>
> Q. To what extent did you consider the Statute of Limitations? A. To some extent.

Q. How did that bear on your final conclusion,—your consideration of the Statute of Limitations and the effect of it? A. It had some influence.

Q. How much?

The Court: Let me ask a question. Was there a serious question with respect to the Statute of Limitations in this case, in your judgment?

Mr. Brickley: I should say, your Honor please, that there is a serious question so far as the application of the statute was considered.

The Court: Then it was considered, and the judgment of Mr. Brickley was that it involved a serious question.

At page 377:

Q. Now, you haven't in any other respects than those in which I asked you specifically, changed your views as stated in your report as special counsel? A. Well, I cannot answer that question specifically, Mr. Whiteside. All I can say to you is this: that having been associated with this case for about two years, and very closely associated with it, and having listened to anyone who wanted to speak to me about it, and having had the benefit of a very extensive investigation by the Securities and Exchange Commission, which included access to the international Paper Company books, and having in mind the uncertainties of the facts and the uncertainties of the law, I reached a conclusion that it was good judgment for Hydro to accept $10,000,000 plus a loan of $3,000,000. That, as nearly as I can put it, states my position.

At page 379. Discussing the aid given him by the S. E. C.:

* * * The fact is that the Securities and Exchange Commission, as a result of my request, assigned certain of its lawyers and accountants * * *. And they spent, as I recollect it, between four and five months examining, digesting, and discussing with me, facts which they acquired as a result of their investigation of the books of the Paper Company and the Hydro System, and from inquiry they made in connection with Canadian matters.

Q. And that was all while you were still special counsel and before you brought your suit? A. No, sir.

Q. They have given you material since? A. It has continued up to date. As a matter of fact, a great deal of the result of the efforts of the SEC has been conveyed to me orally, in discussions I have had with members of the staff. * * * I want to make it very plain that before I made this recommendation I considered every fact which I had, which had come to me, in writing, orally, as a result of my own investigation; and I considered the law as I understood it in the application to the facts which we had. And it was as a result of those things, plus a consideration as to the likelihood of recovery, plus the beneficial or unfavorable effect upon Hydro in connection with this settlement—and I took into consideration everything that I could conceivably take, and then made up my mind as to what I should do.

At page 387. In answer to a question by Mr. Whiteside:

A. My recollection, if your Honor please, is that the first offer was about a half a million dollars and I think then as a result of discussions and as a result of two or three conferences we reached a point where we had an offer of $3,000,000, and I think as the result of further discussions we reached a point where we had an offer of $5,000,000, and as a result of further discussions we

reached a point where we had an offer of seven and a half million dollars, at which time we were told that was the limit which would be recommended, and we could accept it or reject it, and without going into further or greater detail I should say that we had a subsequent conference which resulted in our getting an offer of ten million dollars, I mean we were presented with another amount, but we sought a further conference as a result of which we were able to add to that the loan of $3,000,000 to the Hudson River Power, and I felt that when we reached that point the Paper Company would absolutely stop, and we could not get one additional dollar, and that therefore it was then incumbent upon me to report the matter to the Court and to recommend it or to refuse to recommend it.

The Securities & Exchange Commission which conducted its own independent investigation, and through its staff fully collaborated with Mr. Brickley and his counsel reached a conclusion fully supporting Mr. Brickley's position. The following excerpts from the statement of Mr. Yohalem, who represented the Commission at the hearing, will show the reasons which prompted it to favor the acceptance of the proposed settlement:

At page 459:

"The court is of course familiar and recalls the fact that one of the considerations which led the Commission to apply to this court in 1943 for enforcement of its 11-B-2 order through these proceedings was because of the history of the transaction between the Paper Company and I. H. E. S. and because of the pendency of these claims by or on behalf of I. H. E. S. against the Paper Company.

"I don't think it is necessary for me to again recite in any great detail the large amount of work, investigation and study that these claims have gotten from the Commission staff, from Mr. Brickley and later from counsel."

At page 461:

"* * * Now, it is the Commission's judgment that if the problems which are involved in this litigation have been canvassed, as they have by Messrs. Brickley and Hoar and Langenbach, and if a settlement has been negotiated as between them and the Paper Company and its representatives at arm's length, and a result of a ten million dollar cash payment has been reached, together with the three million dollar commitment for the Hudson River loan; that it reaches an area of very wide discretion and judgment as to whether that is an offer which should be accepted or rejected.

"I am certain that I can assure the court that there would be no difficulty on the Commission's part in recommending approval of the settlement for a sum substantially in excess of ten million dollars. And I think that candor requires me to say as well, perhaps not so vehemently, that it wouldn't be possible to say that a figure which had been reached which was somewhat less than ten million dollars was unacceptable. The acceptable figure lies, as I said a moment ago, in a pretty broad area. What I do say is that it is the view of the Commission that ten million dollars plus the other commitments brings this settlement within the area where it can be and should be approved."

At page 463:

"* * * And so I say and urge that the Court should look at this settlement from the point of view of the

IHES as a corporate entity—not from the point of view, not exclusively from the point of view, of whether the proceeds of the settlement will percolate down to any particular class of security holders in amount sufficient to make a settlement attractive to them."

POINT IV.

The action of the District Court is presumptively right, and should not be set aside unless clearly shown to have been wrong. In approving the settlement, the Court below was bound to take into consideration not only the prospects of recovery, but also the delay, which naturally results from protracted litigation, and the great expense incidental thereto.

The action of the District Court in approving the settlement has every presumption in its favor and the burden of proving it wrong is on the appellants.

In *re Prudence Co., Inc.,* 98 Fed. 2d 559, certiorari denied *Stein* v. *McGrath,* 306 U. S. 636 in which the writer of this brief appeared for the appellant, the District Court had approved a compromise of the claim against the estate of a bankrupt. In affirming, the Circuit Court of Appeals for the Second Circuit stated:

> "The district court did not determine the validity of the government's claim with respect to the taxability of the 'commissions'; nor need this court do so. The very purpose of a compromise is to avoid the determination of sharply contested and dubious issues, as this court pointed out in the case of In re Riggi Bros. Co., 2 Cir., 42 F. 2d 174, 176" (p. 560).

In *Re Riggi Brothers, Inc.,* 42 Fed. 2nd 174, decided by the Circuit Court of Appeals, Second Circuit, a decree of

the district court approving a compromise settlement was affirmed and the court *inter alia* stated (p. 176):

> "The approval of this compromise settlement is not to be tested wholly by what may now be thought would have been the result of litigation to settle the respective claims of the parties. It is certain that litigation for that purpose would have been the inevitable result of a failure to compromise and equally certain that it would have made for delay and expense. This should be kept in mind in reviewing the approval of the compromise. Petition of Stuart (C. C. A.) 272 F. 938-941. Coupled with the certainty of litigation was the uncertainty of its result and the soundness of the exercise of discretion in approving it largely depends upon how substantial was this element of uncertainty. The action of the District Court is presumptively right, and will not set aside unless clearly shown to have been wrong. Pullman Coach Co. v. Eshelman (C. C. A.) 1 F. (2d) 885, 887, 888. Consequently, we shall make no attempt to decide with exactness what would have been the outcome had no settlement been made and approved. Any virtue which may reside in a compromise is based on doing away with the effect of such a decision. For present purposes it is enough to consider only what was reasonably to be expected to happen had no agreement been made * * *"

and at page 177:

> "It is quite enough now to know that the trustee would have met with serious opposition in trying to free the property from the mortgage lien. While he might, perhaps, have succeeded, the nature of the legal problems involved was such that the expense, delay, and likelihood of failure may well have made a compromise settlement advisable."

There can be no doubt that should the proposed settlement fail to be consummated, there would ensue protracted and expensive litigation, since the issues are extremely involved. Nor is there any certainty that the result of such litigation would be such as to justify rejection of the proposed compromise.

POINT V.

Petitioners have failed to adduce sufficient proof of probative value to support their objections to the recommendations of the trustee and the Securities and Exchange Commission.

Aside from the documents and records introduced upon the hearing, appellants did not come forward with any evidence through testimony of witnesses or other proof in order to establish that the proposed settlement was unfair.

If, as appellants contend, the amount of the proposed settlement is wholly disproportionate to the amount of the recovery they expected to obtain, they might well have called expert witnesses to testify to an appraisal of the market values of the properties transferred to Hydro in the transactions complained of and to show to what extent the prices paid by Hydro exceeded such market values, and whether the profits, if any, that accrued to International Paper were unconscionable.

Such witnesses, if produced, could have been cross-examined by those interested parties appearing in support of the proposed compromise who might have also produced witnesses upon the same issue in their own behalf. Failing so to do appellants left the question of the amount possibly recoverable in the realm of speculation. In the absence of such testimony appellants have failed to overcome the presumption that attaches to the action of the court below.

CONCLUSION.

The proceeding here was not the trial of a case on its merits, but the consideration of a proposed compromise. We have noted the divergent views of different counsel with respect both to the enforceability of the claims of Hydro and the advisability of the proposed settlement.

In view of the great lapse of time, the defenses of the Statute of Limitations, ratification and laches interposed by International Paper, should be given due consideration. Nor may one regard lightly the pending motions by International Paper to dismiss for lack of jurisdiction. The District Judge, who has had jurisdiction of the proceedings from their inception and who, in the course thereof had every opportunity to acquaint himself with the contentions of the parties and the factual and legal issues involved, had sufficient basis upon which to exercise his discretion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH NEMEROV,
Attorney for Ethel Kresberg et al,
Intervenors-Respondents,
Office & P. O. Address,
135 Broadway,
Borough of Manhattan,
New York, N. Y.

HERMAN I. LURIE,
ISIDORE SIEGELTUCH,
Of the New York Bar,
Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	3
Argument	9
Conclusion	17

CITATIONS

Cases:	
Central States Electric Corporation, In re, 143 F. 2d 684	15
Cohen v. *Young*, 127 F. 2d 721	16
Eastern New York Paper Co., In re, et al., Holding Company Act of 1935, Release No. 7042 (Dec. 4, 1946)	7
F. P. Newport Corp., In re, 98 F. 2d 453	10
Fernow v. *Gubser*, 136 F. 2d 971	10
International Paper and Power Co., et al., 4 S. E. C. 873	4
Kelley v. *Everglades Drainage District*, 319 U. S. 415	12
Riggi Bros. Co., In re, 42 F. 2d 174	10
Todd v. *S. E. C.*, 139 F. 2d 700	4
Wellman v. *United States*, 25 F. Supp. 868	9
Woodruff v. *Heiser*, 150 F. 2d 873, certiorari denied, 326 U. S. 778	9
Statutes:	
Bankruptcy Act, Chapter IX, Sec. 83 (e) (11 U. S. C. 403 (e))	12
Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803 (15 U. S. C. 79, *et seq.*):	
Sec. 5 (a)	3
Sec. 11 (b) (2)	4
Sec. 11 (d)	4
Sec. 18 (f)	4
Sec. 25	4
Miscellaneous:	
Federal Rules of Civil Procedure (28 U. S. C. following § 723):	
Rule 52 (a)	9, 10
Rule 66	11

728947—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD AND PAUL H. TODD, PETITIONERS

v.

BARTHOLOMEW A. BRICKLEY, TRUSTEE OF INTERNATIONAL HYDRO ELECTRIC SYSTEM, SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 1721–1736) is as yet unreported. The district court filed no opinion. Its decree is contained in pages 348 to 353 of the printed record.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 14, 1946 (R. 1736).

A stay of mandate was ordered on November 25, 1946, pending application for certiorari (R. 1736). The petition for a writ of certiorari was filed on December 28, 1946. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347, which is made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U. S. C. 79y.

QUESTIONS PRESENTED

The district court approved a settlement which included payment of the sum of $10,000,000 in cash in compromise of certain disputed claims made the subject of collateral litigation instituted by a court-appointed trustee on behalf of an estate being administered under the Public Utility Holding Company Act of 1935, it appearing that there were substantial problems of proof and doubtful issues of law which seriously affected the certainty and amount of recovery. The district court found that the settlement was for the best interests of the estate and was fair, reasonable and adequate.

The questions presented are—

1. (a) Whether the circuit court of appeals properly held that the findings made by the district court were sufficient, in view of the nature of the question for determination.

(b) Whether, in such a case, the district court was required by the Federal Rules of Civil Pro-

cedure to enter detailed findings of fact and conclusions of law.

2. Whether the court below properly held that the district court did not abuse its discretion in approving the settlement?

STATEMENT

The International Hydro Electric System ("Hydro") is a public utility holding company registered under Section 5 (a) of the Public Utility Holding Company Act of 1935 (the "Act"), 49 Stat. 812, 15 U. S. C. 79e (a) (R. 194).[1] It owns controlling interests in several operating utility companies and in the New England Power Association which is itself a registered holding company with numerous subsidiaries of its own (R. 195–198). In turn, until January 1939, Hydro was a subsidiary of the International Paper Company ("Paper Company").[2] In 1939, Paper Company disposed of its holdings in Hydro as part of a general divestment of its power securi-

[1] Registration was effected on February 2, 1939.

[2] The present International Paper Company was formed in 1941, and acquired all the assets and assumed all the liabilities of International Paper & Power Company which had been formed in 1928 for the purpose of taking control of the old International Paper Company as part of a plan by the latter to separate its water-power and paper interests. In 1941, the old International Paper Company was consolidated into the new company (R. 487–488).

Except where referred to as a defendant in the lawsuits, "Paper Company" means the old International Paper Company.

ties enabling the Commission to declare it not to be a holding company within the meaning of the Act.[3]

In July of 1942, after extended hearings held for the purpose of determining what action was necessary, under Section 11 (b) (2) of the Act, 49 Stat. 821, 15 U. S. C. 79k (b) (2), to insure that the corporate structure of Hydro, or its continued existence, would not unduly complicate Hydro's holding company system or unfairly distribute voting power among the security holders therein, the Securities and Exchange Commission (the "Commission") ordered the liquidation and dissolution of Hydro and required it to submit a plan for that purpose (R. 238). That order was reviewed on the merits and sustained by the Circuit Court of Appeals for the Sixth Circuit in June of 1943 (R. 194, 243).[4]

Thereafter, in August of 1943, the Commission instituted an action in the United States District Court for the District of Massachusetts, under Sections 11 (d), 18 (f), and 25 of the Act, 49 Stat. 821, 832, 835, 15 U. S. C. §§ 79k (d), 79r (f), and 79y, for the purpose of obtaining compliance with its liquidation and dissolution order (R. 192). Its application to the court stated, *inter alia,* that Hydro had indicated its inability to comply with the Commission's order without the help of the

---

[3] *International Paper and Power Co., et al.*, 4 S. E. C. 873.
[4] *Todd* v. *S. E. C.*, 139 F. 2d 700 (C. C. A. 6).

court; that liquidation and dissolution could not properly be effectuated without resolution of claims asserted in two pending shareholders' derivative actions on behalf of Hydro against the Paper Company, seeking rescission of the transactions by which Hydro acquired from the Paper Company and its affiliates some or all of its principal assets, or seeking, in the alternative, large sums as damages; and that the threatened multiplicity of lawsuits would interfere seriously with the orderly liquidation and dissolution contemplated by the Commission's order (R. 195–201). Accordingly, the district court was asked to take exclusive jurisdiction of Hydro and its assets and to enjoin all interference with the Section 11 (d) enforcement proceedings, including the commencement or prosecution of any actions against or on behalf of Hydro, with the exception of the two pending stockholders' actions. In addition, the Commission asked the district court to appoint a special counsel to investigate the alleged causes of action against the Paper Company and to file a report and recommendation with regard thereto (R. 201–203).

The relief sought by the Commission was granted by the district court without opposition, and, in October 1943, Bartholomew A. Brickley was appointed special counsel to investigate Hydro's claims against the Paper Company (R. 260–262). The Commission also commenced its

own investigation for the purpose of aiding Brickley and subsequently was able to furnish him with considerable data and numerous studies made by its staff (R. 263, 459–460).

In November of 1944, more than a year after his appointment, Brickley filed his report as special counsel (R. 263–306). The report sets forth the data uncovered by Brickley from examinations of witnesses, corporate records, files, accounts, and other available materials (R. 267–293). The examinations of witnesses, however, were *ex parte* without opportunity for cross examination or rebuttal by the defendants in the litigation (R. 262, 1319, 1599, 1661). The report acknowledges the many legal problems involved in the successful prosecution of Hydro's claims but nevertheless recommends the institution of court proceedings for the purpose of obtaining rescission, damages, or both (R. 294).

The facts which Hydro would attempt to prove in its lawsuits against the Paper Company and its affiliates are set forth in Brickley's report as special counsel (R. 263–306), and are also referred to in the briefs of the other parties. No useful purpose would be served by further restatement in this brief.

In November of 1944, shortly after the filing of his report as special counsel, Brickley was appointed trustee of the estate of Hydro and directed to institute suit against the Paper Com-

pany (R. 306–307). In January of 1945, the trustee instituted two lawsuits, one in the United States District Court for the District of Massachusetts and another in the Massachusetts Superior Court for Suffolk County, each seeking rescission or damages in the total approximate amount of $96,000,000 (R. 308).

Thereafter, Brickley and the Paper Company began negotiations for the possible compromise and settlement of the litigation (R. 309). On November 13, 1945, before any trial on the merits, an agreement was reached providing terms and conditions for the termination of all litigation arising from the transactions involved, including the two shareholders' actions previously mentioned, subject to the approval of the court (R. 311–317). Under the agreement, the estate of Hydro would receive $10,000,000 in cash,[5] and the undertaking of the Paper Company to purchase $3,000,000 of second mortgage bonds of one of Hydro's subsidiaries.[6]

---

[5] The Paper Company's original offer was approximately $500,000. After many discussions, it offered $3,000,000. The offer was subsequently raised to $5,000,000, to $7,500,000, and finally to $10,000,000 (R. 387).

[6] A modification of this latter obligation, agreeable to the parties in interest, has been consummated with the approval of the Commission under applicable provisions of the Holding Company Act. See *In re Eastern New York Paper Co., et al.*, Holding Company Act of 1935, Release No. 7042. (Dec. 4, 1946.)

728947—47——2

Court approval of the settlement was sought in a petition filed by Brickley on November 23, 1945 (R. 307), and was granted on December 26, 1945 (R. 348–353), following a hearing held on December 17, 18 and 21, 1945 (R. 347). The district court filed no opinion but did find in its decree that "the compromise * * * agreement * * * is for the best interests of the estate of said System [i. e., Hydro], [and] that the consideration payable thereunder to said System is fair, reasonable, and adequate" (R. 348).

Prompt action by the district court was compelled by provisions in the settlement agreement conditioning its effectiveness upon court approval by December 29, 1945, and upon receipt by the Paper Company on or before December 29, 1945, of a ruling (as distinguished from a closing agreement) from the Collector of Internal Revenue that payment by deposit of the $10,000,000 with the clerk of court prior to December 31, 1945, would entitle it to deduct the sum from its gross income for the year 1945 (R. 315–316). These conditions were met and the sum deposited on December 28, 1945 (R. 1711).

On January 25, 1946, petitioners, junior security holders of Hydro, appealed from the decree of the district court approving the compromise settlement (R. 1705–1706), and, on November 14, 1946, the circuit court of appeals entered its judgment affirming that decree (R. 1736).

ARGUMENT

1. The circuit court of appeals properly concluded that the district court had made such findings of fact as were consonant with the nature of the case. The settlement offer had been accepted by the trustee after consideration of the hazards of litigation, including substantial problems of proof and doubtful issues of law affecting the certainty and extent of potential recovery. The district court specifically found that "the compromise * * * agreement * * * is for the best interests of the state * * * [and] that the consideration payable thereunder * * * is fair, reasonable, and adequate" (R. 348).[7] These were findings of the "ultimate facts" in the controversy, *i. e.*, the resolution of all the imponderables in the determination of whether or not the compromise was fair, reasonable and adequate.

Certainly, it was not the function of the court to make findings upon the facts which would have to be determined in the suits against the Paper Company prior to any trial therein or to resolve the legal issues there involved before proper resolution of the essential facts. The question before the court was the approval of a

[7] Findings of fact, of course, need not be formally labeled as such. A statement in a decree, order, or even opinion of the court is sufficient compliance with Rule 52 (a) where applicable: *Woodruff* v. *Heiser*, 150 F. 2d 873 (C. C. A. 10), certiorari denied, 326 U. S. 778; *Wellman* v. *United States*, 25 F. Supp. 868, 869 (D. Mass.).

compromise settlement of untried claims rather than the determination of the validity of Hydro's alleged causes of action. Cataloging the various considerations, intangible and otherwise, which the court may have taken into account in arriving at its ultimate determination to approve the business judgment of the trustee would have hardly constituted "findings" of the type contemplated by Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C., following § 723, applicable to an "action tried upon the facts". Factors such as these fully justify the ruling of the court below that the "ultimate facts" found by the district court satisfied the requirement of Rule 52 (a), if applicable to a case of this character.[8]

The court below also ruled that Rule 52 (a) did not apply since the instant case was not an "action tried upon the facts". Rather, since approval of the compromise settlement arose in the

[8] Petitioners have cited no case involving judicial approval of a compromise settlement in which more detailed findings were required, and we are aware of none. Compare *Fernow v. Gubser*, 136 F. 2d 971, 972 (C. C. A. 10) ("the court expressly found that the compromise was just, equitable, and to the best interests of both companies and all other parties in interest".); *In re Riggi Bros. Co.*, 42 F. 2d 174, 177 (C. C. A. 2) ("the District Judge * * * found that the settlement was beneficial to all the creditors"); and *In re F. P. Newport Corp.*, 98 F. 2d 453, 457 (C. C. A. 9, 1938) ("* * * the trial court's finding that the agreement, as modified, was equitable, fair and advantageous to the bankrupt estate").

course of the administration of an estate under the Public Utility Holding Company Act of 1935, Brickley's position being similar to that of a court-appointed receiver, the court below held that Rule 66, instead, was applicable (R. 1736). That rule provides that the practice in the administration of estates by receivers and similar court-appointed officers shall be in accordance with the prior practice in the federal courts, or as provided by local rules of court. We know of no settled equity practice in receiverships justifying the conclusion that detailed findings are required by Rule 66 in a controversy of this sort, nor are such findings required by any local rule of court.

Petitioners' assertion (Pet. 7) that "the Court of Appeals has declared that the usual duties incumbent upon lower federal courts, to support their decisions with findings of fact and conclusions of law, are inapplicable to proceedings under the Holding Company Act" is, of course, a clear misconception of the ruling below. All that is decided is that detailed findings are not required of a judge in approving, before trial, a compromise settlement of doubtful litigation in the course of the administration of an estate under court supervision. Whether or not more detailed findings of fact and conclusions of law will be required in other controversies arising in proceedings under the Act depends, of course, upon the nature of the controversy before the court.

Petitioners cite a number of cases in which this Court and various lower federal courts have emphasized the necessity of adequate findings of fact and conclusions of law. However, none of these cases involved the compromise of litigation nor indeed the resolution of issues as dubious and imponderable as those in the compromised litigation, and all involved controversies which could be resolved only after a determination of the essential facts and applicable law. This is also true of *Kelley* v. *Everglades Drainage District*, 319 U. S. 415, cited by petitioners (Pet. 10, 11, 49), which involved approval of a plan of composition in a municipal bankruptcy proceeding under Chapter IX of the Bankruptcy Act, 11 U. S. C. 401, *et seq.* Moreover, findings of fact and conclusions of law are expressly required by Section 83 (e) of Chapter IX, 11 U. S. C. 403 (e), in approving such plan of composition. Accordingly, the court below has not decided the "findings" question "in a way probably in conflict" (Pet. 10) with any decision of this Court or that of any other tribunal.

2. The remaining question relates to the alleged inadequacy of the settlement in light of what petitioners regard as the probable recovery through litigation and, accordingly, the alleged abuse of judicial discretion in approving the compromise in question. This is not an issue of general public importance such as would warrant review by this

Court. In effect, petitioners are seeking to have this Court review the appraisal by two lower federal courts of the settlement value of uncertain claims involving, first, an evaluation of what could be expected to be proved if the litigation were prosecuted and, second, the application, largely, of local law to whatever facts might be established upon a trial on the merits. Moreover, we show below that petitioners' complaint as to abuse of judicial discretion is entirely unfounded.

A substantial portion of petitioners' brief is devoted to arguments on the problems of proof and the merits of the defenses which the Paper Company would avail itself if the lawsuits were continued. All of this, of course, is for the evident purpose of supporting petitioners' claim of a possible recovery of approximately $131,000,000 through litigation as compared with a recovery of $10,000,000 by way of settlement. The same arguments were made before the circuit court of appeals and were fully answered in the well-considered opinion of the court below. These arguments are also dealt with in the briefs of the other respondents, so that no useful purpose would be served by repeating the discussion in this brief. Suffice it to note that the Commission believes, and so advised the courts below, that there was ample warrant for the institution of legal proceedings against the Paper Company and its affiliates, and that continuation of the proceedings

might well have resulted in a judgment in excess of the amount of the settlement. However, petitioners' arguments appear to exaggerate greatly the certainty and total amount of recovery, and slight many legal and evidentiary matters which would have had to be encountered in the successful prosecution of the litigation. As the court below noted (R. 1725), "a defendant only has to make good on one defense to win a lawsuit." After full consideration of the various issues, the circuit court of appeals properly concluded (R. 1734–35) that "the questions involved in the litigation begun by the Trustee are hard and complicated both in facts to be proved and law to be applied" and that there was no abuse of discretion in the district court's determination to approve the compromise settlement.

Contrary to petitioners' assumption, there were substantial problems of proof and disputable issues of law. Petitioners treat the Brickley report as if it were a stipulation of facts agreed upon by the respective parties, whereas actually it is little more than a documented bill of complaint setting forth the facts which the plaintiff would endeavor to prove at a trial. Whatever its accuracy, the trustee was still faced with an enormous problem of proof relating to transactions dating as far back as the middle twenties and involving the production of numerous witnesses and documents, all subject to the hazards of cross-exami-

nation and countervailing evidence. The examination of witnesses during the course of Brickley's investigation had been private and *ex parte*. A substantial portion of the documentary evidence did not come from the Paper Company's files, was not subject to authentication, and possibly might not be admissible in the litigation instituted by the trustee. Moreover, petitioners' estimates of possible recovery are predicated upon theories of damages which may be subject to dispute and which might or might not be accepted by the court ultimately ruling upon the matter.

In view of the foregoing, the court below properly concluded that the district court did not abuse its discretion in telling "the Trustee it was proper to take the bird in hand instead of a prospective flock in the bush" (R. 1735).

3. *In re Central States Electric Corporation*, 143 F. 2d 684 (C. C. A. 4) cited by petitioners (Pet. 15–16), is not in conflict with the decision below. That case merely insisted upon a vigorous discharge of the functions of a reorganization trustee to investigate and prosecute causes of action growing out of the past management of the debtor. It was held that the reorganization judge was not warranted in abandoning efforts at recovery because a bondholders' committee had objected to the expenditures involved where other security holders as well as the Securities and

Exchange Commission urged, and the circuit court of appeals found, that there was a strong indication of the probable existence of causes of action. In the present case a full investigation has been made, litigation thereupon was instituted, and the settlement recommended both by the independent trustee and by the Commission which had also conducted an extensive investigation of its own.[9] The settlement thus obtained represents a substantial recovery for the estate. The opposition comes from junior security holders having a marginal interest, while the primary risk of rejecting the settlement in favor of expensive, protracted, and possibly fruitless litigation would fall upon the holders of the senior securities who have the dominant interest.

---

[9] Contrary to petitioners' allegation (Pet. 12), the court below did not "merely accept the opinion of 'eminent counsel'" as in *Cohen* v. *Young*, 127 F. 2d 721 (C. C. A. 6). In that case, the district judge had approved dismissal of a class action under a compromise agreement solely because the attorneys representing all parties of record had agreed to it. The appellate court found that the district judge had not performed his function of examining the compromise for the purpose of satisfying himself that the interests of the corporation and the stockholders would be fully protected. In the present case, while the recommendations of the Commission and Brickley were given consideration, approval of the settlement was based upon all the circumstances relevant to the question of whether or not the compromise was for the best interests of the estate and was fair, reasonable, and adequate.

CONCLUSION

The petition fails to disclose any question of general public importance, and there is no conflict between the decision below and that of any other court. The case was correctly decided below and there is no need for further review.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

ROGER S. FOSTER,
Solicitor,

ROBERT S. RUBIN,
Associate Solicitor,

ALEXANDER COHEN,
Attorney,
Securities and Exchange Commission.

JANUARY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

FILED
MAR 6 1947
CHARLES ELMORE CROPLEY
CLERK

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,

vs.

BARTHOLOMEW A. BRICKLEY,
Trustee of International Hydro Electric System,
SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents

APPLICATION FOR REHEARING

HOWELL VAN AUKEN,
Attorney for Petitioners,
1603 Ford Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,

vs.

BARTHOLOMEW A. BRICKLEY,
Trustee of International Hydro Electric System,
SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents

APPLICATION FOR REHEARING

The petition for certiorari in this case having been denied by the Court on February 10, 1947, petitioners Osmond Y. Ladd and Paul H. Todd make this present application for rehearing and for an order vacating denial and now granting certiorari.

1. Particularly, petitioners wish to be sure that they have made plain their point, that the Court of Appeals, with respect to Civil Procedure Rule 52(a), requiring findings of fact and conclusions of law by the lower courts in support of their decisions, has erroneously decided that this rule is not applicable to Section 11 enforcement proceedings under the Public Utility Holding Company Act, 15 U. S. C. A. Sec. 79k (d).

This decision involves an important principle of general interest to all litigants under the holding company act, and should be corrected.

The Appellate Court stated:

> "The second answer is that we do not think Rule 52(a) is applicable to this case * * *. The court was not trying issues on facts, it was administering an estate under the provisions of a federal statute, the Public Utility Holding Company Act of 1935. Mr. Brickley, as Trustee, was in a position similar to that of a receiver. The provision of the Federal Rules applicable to such situation is Rule 66, not Rule 52(a)" (R. 1736).

With respect to Section 11 enforcement proceedings for effectuating SEC orders in reorganization, simplification or liquidation of holding companies, it is provided—

> "* * * the Court, as a court of equity may, to such extent as it deems necessary * * * take exclusive jurisdiction and possession of the company * * * and the Court shall have jurisdiction in any such proceeding to appoint a trustee * * * to hold or administer under the direction of the Court, the assets so possessed * * *. In any such proceeding * * * the trustee with the approval of the Court shall have power to dispose of any and all of such assets and subject to such terms and conditions as the Court may prescribe, may make such disposition

> in accordance with a fair and equitable reorganization plan which has been approved by the Commission."
>
> 15 U. S. C. A. §79k (d).

In such proceedings, many types of contested issues are and can be involved, respecting which interested parties have rights of review. The reviewing courts in these cases, have the same need for considered findings and conclusions by the lower courts, as are required in other cases, generally. As these appeals become more numerous, we have no doubt that this Court will so recognize.

Rule 66 reads as follows:

> "The practice in the administration of estates by receivers or by other similar officers appointed by the Court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."
>
> 28 U. S. C. A. Secs. 721-723 (West Pub. Co. Edn.) p. 740.

The District Court in Massachusetts has promulgated no rules on receiverships. Before adoption of Rule 66, it had not been the practice in Federal Courts to dispense with findings in contested receivership matters.

See former equity rule 70½ reading—

> "In deciding suits in equity * * * the Court of first instance shall find the facts specially and state separately its conclusions of law thereon."
>
> 28 U. S. C. A. Sec. 721-723 (West Pub. Co. Edn.) p. 816.

But in any event, Rule 66 as now effective, requires that proceedings on appeal in receivership proceedings be subject to these the Civil Procedure rules.

Findings of fact and conclusions of law are prerequisites for proper review under such rules. If all appeals are to be subject to these rules, it is implicit that appealable orders in receivership matters be supported by findings and conclusions, enabling an adequate review.

2. The Court of Appeals also held that general findings of an ultimate nature constituted sufficient compliance with Rule 52(a) and that findings upon subsidiary issues indicating factual basis for the ultimate decision, are unnecessary.

This runs counter to the *Kelly-Everglades case,* 319 U. S. 415 at 422.

In conclusion it is submitted that the foregoing considerations as to the proper interpretation of these new Civil Procedure rules in holding company enforcement cases, are matters of general concern to the great number of parties interested in such holding companies.

These considerations should be clarified by this Court and it is respectfully requested that rehearing be granted, that the order denying certiorari be vacated, and that certiorari be now granted.

HOWELL VAN AUKEN,
Attorney for Petitioners.

Business Address:
1603 Ford Building,
Detroit 26, Michigan.

Howell Van Auken, counsel for Petitioners, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for the purposes of delay.

HOWELL VAN AUKEN.

Dated: February 28, 1947.